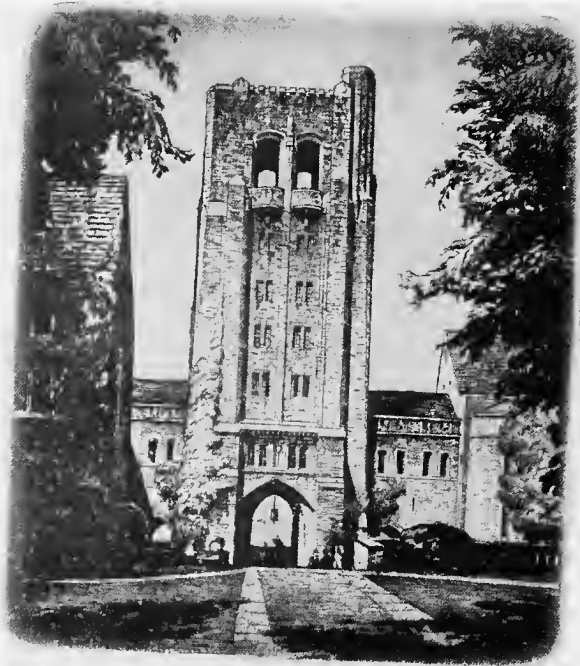


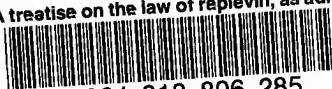
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A TREATISE
ON THE
LAW OF REPLEVIN,
AS ADMINISTERED IN THE COURTS
OF
THE UNITED STATES AND ENGLAND.

*copy
ARD*
BY H. W. WELLS,
COUNSELLOR AT LAW.

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PREFACE.

One of the first books treating on a single action at law was Gilbert on Replevin, published in 1756. This was followed by Wilkinson on Replevin, in 1825, and by Morris, the last edition of which is still fresh from the press. The two former works, though valuable and exhaustive treatises in their time, have become antiquated. The following pages contain an attempt to state the law of replevin as generally applicable in this country; a task attended with difficulty, in view of the differences in local laws.

The author has forborne to insert copies of cases in the notes, which, while it would have swelled the number of pages, would not, as is believed, have been attended with any corresponding advantage.

The work contains over five thousand references, and cites over three thousand authorities.

H. W. W.

PEORIA, October 29, 1879.

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THE LAW OF REPLEVIN.

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CHAPTER I.

HISTORICAL INTRODUCTION.

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§ 1. **Origin of replevin unknown.** Replevin was among the earliest remedies given by the common law. Its origin antedates its written history an unknown period, and, like the ori-

gin of the common law, of which it forms part, it can only be said to come from an age in which all our laws existed simply in tradition. Glanvil, the earliest writer on the laws of England, gives the writ as it was in his time, and as it must have existed before. Blackstone speaks of the action as "an institution which the Mirror ascribes to Glanvil."¹ The passage referred to by the learned author does not wholly justify the statement.² It would seem probable that Glanvil was the author of some regulation which afterward took form in the statute of Marlbridge; but the statute was not enacted until nearly eighty years after his death. Judges of that period were arbitrary in the exercise of their power, but Glanvil makes no claim to having originated this action; he simply wrote of the laws as they then existed.³ The writ was certainly one of the earliest, and may have been in existence before the chancery was known.⁴

§ 2. Its first appearance as part of the *lex scripta*. It makes its first appearance as a part of the *lex scripta* in the statute

¹ 3 Blackstone, 146.

² The full text of the Mirror referred to by Blackstone is as follows: "If any be wrongfully distrained, ye are to distinguish whether it be by those who have the power to distrain, or by others; and if by others, then lieth an appeal of robbery, whereof HALLIF gave a notable judgment; and if by those who may distrain, then they ought to deliver the distress by gage and pledges. And if the distrainer and the plaintiff of the distress lead it away, then the connisance thereof doth belong to the King's Court, and so there is a remedy by a writ of *replegari facias*. Nevertheless, for the releasing of such distress, and for the hastening of the right, Rudolph de Glanvil ordained that sheriffs and hundredors should take securities to pursue the complaints, and should deliver the distresses, and should hear and determine the plaints of tortious distresses, saving to the king the suit as to leading," etc. Mirror of the Justices, Ch. 2, § 26.

³ He says, in his preface: "The laws of England, though not written, may, without impropriety, be termed laws. * * * There are some well established rules which, as they more frequently arise in court, it appears to me not to be presumptuous to put into writing."

⁴ See preface to 8th Vol. Coke's Reports, p. 17. Herteford, a learned sergeant in the time of Edward I., mentions several writs which he thinks were invented before the chancery was known. Year Book, 30, 31, Edward I., 276. The chancery was an office for issuing writs long before it acquired jurisdiction as a court. Lives of the Chancellors, Vol. 1, p. 2, *et seq.*; Story's Eq. Jurisp., Vol. 1, Ch. 2.

of Marlbridge, 52 Henry III., A. D. 1267. The twenty-first chapter of this statute is on the subject of replevin, while other chapters relate to the subject of distress, which, as will appear, was closely allied to replevin in the ancient law.¹

§ 3. Its prior existence apparent. From this statute it clearly appears that prior to its enactment the action was in general and frequent use; that it had grown into a well defined proceeding, with established forms, rules and precedents too strongly fixed to be disregarded or avoided. It may also be inferred from the statute that the defects and inadequacies in prior laws were of such magnitude, and the inconveniences resulting therefrom were so general as to demand an act of Parliament for their correction at a time when acts of Parliament, especially such as might operate in favor of the tenant and against the lord, were of rare occurrence.²

§ 4. The origin of the statute of Marlbridge. The contests which arose between the king and the nobles, called the wars of the barons, and which came to a close in the reign of Henry III., rendered England a scene of the greatest turbulence. In this conflict the people, alternately courted by both parties, became more and more sensible of their rights and their importance, and out of these influences the statutes of Marlbridge, among others, came to be enacted.³

§ 5. Originally it was an action to recover chattels wrongfully taken or wrongfully detained. By the ancient law replevin was an action to recover chattels wrongfully taken or wrongfully detained. "The substance of this plea," says Britton, "consists of two things, to-wit: the taking and the de-

¹ Replevin was treated of under the title of distress, by all the old authors. Britton, Vol. 1, Ch. 28; Fleta Mirror, Ch. 2, § 26; Gilbert, in his work on Replevin, and many other writers.

² *Post*, § 9, note.

³ DeLolme, on the Constitution of England, p. 155. This statute, (so called from Marlborough, in Wiltshire, where King Henry III. held a Parliament in November, 1267,) has ever been regarded as one of the charters of English liberties. Chapter 5 contains a re-affirmance of the first great charter of Henry III.; and the name *Magna Charta*, which it has ever since retained, was first given to it in this chapter. Thompson's Essay on Magna Charta, p. 381. No official record of this statute is known to exist. It is one of the ancient statutes. See preface to Statutes at Large.

taining, * * * and because he who wrongfully detains does a greater injury than he who wrongfully takes, the principal burden of the answer shall fall on the detainers."¹ There is nothing in the writ, even in its earliest form, which would necessarily confine it to the recovery of distresses;² but by the common law the action was, without doubt, practically limited to the recovery of distresses wrongfully taken and detained.³

§ 6. **Distresses.** Distress was the taking of a personal chattel out of the possession of an alleged wrong-doer, by the person claiming to be injured, into his own custody to compel satisfaction for the wrong complained of.⁴ This taking doubtless originated in the rough exercise of pure force, for which the will of the taker was the sole warrant. The written history of the law is not explicit on this subject, but enough remains to justify the belief that before the law had attained vigor enough to enforce its mandates, or compel that respect which is yielded to superior power, rude men employed their own individual force, and indemnified themselves for any real or supposed injury or default of another, by seizing from their adversary enough of his movables to satisfy or compensate them for their supposed loss.⁵ The possession of sufficient force being the only pre-requisite to the seizure, of course such a taking would be stoutly resisted by any person who deemed himself able to make his resistance successful, or a

¹ Britton, translated by Nichols, Vol. 1, Chap. XXVIII.; F. N. B. 68, and following.

² The writ given by Glanvil is almost identical with the later writ. See § 11, note. Wilks. on Rep. 2. Two things fall in these complaints of taking and detaining, whereof there are four degrees: 1st. When the taking is justifiable for lawful, etc., and the detaining also, as for a debt due, or a debt recovered. 2d. Where both are wrongful, such as are disavowable both in taking and detaining. 3d. Where the taking is lawful, as in damage feasant and the taking tortious as against sufficient gages and pledges tendered. Mirror of Justices Ch. 2, § 26.

³ See *post* Chap. 2.

⁴ 3 Blackstone, 6; Gilbert on Distresses, 4; Anon Dyer, 280; Bradby on Distresses, p. 1, and following

⁵ Distresses are called Revenges in Stat. Marlbridge, 52; H. III. Chap. 1 and 3, A. D. 1267.

recaption, or ample reprisals would be made at the earliest moment the party was prepared to do so.¹ Serious contests, long and bitter feuds and bloodshed were the common results. In process of time, as society began to grow stronger, and the public safety to forbid such contests, custom and law began to have force; the taking, though still permitted, was hedged in by certain rules; resistance or recaption was forbidden unless, as was grimly said, the taking was wrongful; the thing taken came to be regarded in the light of a pledge or security, to be returned when satisfaction was made; and replevin grew and became a legal proceeding by which a person might recover his property wrongfully taken or wrongfully detained from him by distress.²

§ 7. Usually for rent. The injury for which distress was most usually permitted was the non-payment of rent or dues by a tenant to his lord. If the tenant failed in the payment of his rent, or refused to perform the service which his feudal contract bound him to do, the lord would seize his goods, (usually cattle,) and detain them as a pledge or security to compel payment or performance.³ The thing taken, as well as the process by which it was taken, was called a distress.⁴

§ 8. Could not be sold. Prior to the statute, 2 W. & M. Ch. 5, a distress, unless for dues to the King, could not be sold, and so was no payment or satisfaction to the distrainor; it could be held as a pledge or security only. The distrainor might impound the cattle in pound overt to be fed by the owner, and at the owner's risk in case they died,⁵ and so pain or distress him until he should perform the service, or dis-

¹ This afterwards came to be called *brevia manu*, "writs of hand." Historical Law Tracts published by Miller, (London, 1745,) 289.

² Mathews v. Carey, 3 Mod. 137; Anon Dyer, 280; 3 Blackstone, 6, *et seq.* 145, *et seq.*; Year Books *passim*.

³ 3 Blackstone, 145, *et seq.*; F. N. B. 68; Evans v. Brander, 2 H. Bla. 547.

⁴ 3 Blackstone, 6. Distresses were usually the cattle of the debtor. The term cattle included horses, down to quite a late period — Macauley's Hist. Vol. 1, p. 294 — and originally was synonymous with chattel.

⁵ Gilbert on Distresses, 4; Anon Dyer, 280 b; 3 Blackstone, 14-145, *et seq.*; Woglam v. Cowperthwaite, 2 Dall. 68; King v. Blackmore, 72 Pa. St. 347. In this country it is the duty of the party impounding cattle to feed them. Adams v. Adams, 13 Pick. 385.

charge his cattle by payment of the sum for which they were distrained.

§ 9. **Abuses of the right of distress.** Gross abuses grew out of the exercise of this right of distress. In the wars of the barons each was anxious to appear at the head of the largest body of vassals. Distresses were frequently made to compel the tenant to perform military service not due, or to perform service which he was not bound to perform under his tenure. When neighboring lords were seeking to enlarge their domains, the tenants were frequently distrained upon by both. The husbandry of the realm, then its only support, was greatly injured, and the public peace disturbed. In the latter part of the reign of Henry III. laws were enacted regulating distress and enlarging and simplifying the remedies for illegal distresses,¹ and it was from one of these acts, that is the twenty-first chapter of the Statute of Marlbridge, that the action of replevin received its principal impetus.

§ 10. **Replevin defined.** To replevy, as its name (*replegiare* — to take back the pledge,) indicates, is when the person distrained upon applies to the proper officer, and has his distress returned to him upon giving security to try the right of taking or distraining in an action at law.² The writ did not contain a summons to the defendant, and was not returnable to any superior court, but commanded the sheriff to see justice done between the parties. The sheriff, by the writ, was authorized to act as the judge. In this the writ differed from ordinary writs, in which the sheriff acted in his ministerial capacity.³

§ 11. **The writ was not returnable, but gave the sheriff power to try the case.** Prior to the enactment of the Statute of Marlbridge the proceeding was commenced by writ issuing

¹ Statute de Districtione Scaccarii, 51, Henry III. 1266; Statute Marl. 52, Henry III. C. 1, A. D. 1267; Reeves' Hist. Vol. 2, p. 66; Gilbert on Distresses, 3; 3 Blackstone, 14-146.

² 3 Blackstone Com. 13; Co. Litt. 145 b. *Vetitum namium* (forbidden pledge,) as it was anciently called, was when the bailiff of the lord distrained and the lord forbiddeth the sheriff to deliver the distress when the sheriff cometh to deliver it. 2 Inst. 140; Gilbert on R. 79. Spelm. Law Gloss.

³ Fitz N. B. 86; 3 Blackstone, 146, 147; Weaver v. Lawrence, 1 Dall. 156.

out of chancery.¹ It was a judicial writ; so called because it gave the sheriff power to hear and determine the matter complained of.²

§ 12. If the defendant claimed to own the property, the sheriff could not proceed. If the defendant claimed to own the property, the sheriff could proceed no further with the replevin. The writ was framed to try the question of caption or detention only, and not the title to the property; but the plaintiff might sue in an appeal of felony, and if he was successful he got his goods, and the taker was regarded as a robber, and was hanged.³ Subsequently, when the property was so claimed by the defendant, the writ *de proprietate probanda* was sued out to settle the question of ownership, and that was first determined. For the defendant to claim that he owned the goods, on the trial of the suit, was unheard of in early cases.⁴

¹ The form of the writ was as follows:

"THE KING, etc., to the Sheriff, etc.:

"We command you, that justly, and without delay, you cause to be replevied the cattle of B., which D. took and unjustly detains, as it is said, and afterwards thereupon cause him justly to be removed, that we may hear no more clamour thereupon for want of justice," etc.

"Pledges—"

Fitz N. B., 68 D. The writ given by Glanvil is substantially the same. Glanvil, Beam's Trans. 294.

² Gilbert, Blackstone, and other writers, speak of such writs as *vicontiel*—not being returnable, but commanding the sheriff *vice comite*, to see justice done. Such writs were common in the early history of the law. Gilbert on Replevin, 59; 3 Blackstone, 238. The *Natura Brevium* contains many such writs. Fitz N. B. *passim*; Glanvil, Book 12, Ch. 12; Crabb's Hist. Eng. Law, 116.

³ Britton, Vol. 1, Ch. 28; Mirror, Ch. 2, § 26, cited *ante*, § 1, note 1; *Ex parte* Chamberlain, 1 Scho. & Lef. 320, note. This appeal was made as follows: John, who is here, appeals Peter, who is there, that, whereas, the same John, on such a day, and had a horse which he kept in his stable. The same Peter there came, and the same horse feloniously, as a felon, stole from him, and took and led away, against the peace, and that this he wickedly did the same John offers to prove by his body, as the court shall award that he ought to do it. Britton, Vol. 1, p. 115.

⁴ Gilbert on Replevin, 98; 3 Blackstone Com. 148; Shannon v. Shannon, 1 Scho. & Lef. 327; Leonard v. Stacy, 6 Mod. 140. If the sheriff took the property after a claim of ownership by the defendant, he was a trespasser *ab initio*. "In replevin, the defendant said he had property in the beasts

§ 13. *Alias and pluries writs, and the practice.* Pluries always returnable. The reason therefor. If the sheriff failed to serve the first writ, the plaintiff was entitled to an *alias*, and then to a *pluries*. In practice, however, it became usual for the plaintiff to take all three, the writ, the *alias* and the *pluries* at one time.¹ And he might deliver all these writs to the sheriff;² or he might deliver the *alias* or *pluries* only, as he saw fit.³ The original, as has been said, and the *alias* were not returnable, but the *pluries* always contained the clause *vel causam nobis certifies*; etc., or certify to us the reason why, etc. This writ was always returnable, the sheriff being therein commanded to certify the reason why he could not, or would not, execute the command of the former writs. The reason, as stated by Gilbert, being, 'the sheriff, having twice failed in his duty, (in not returning the original and *alias*,) was not further to be trusted with judicial power, and as he is answerable to the court how he has obeyed the command of the writ, the court must have it, to see whether he has done his duty or not. If he had failed, he was fined for disobedience.⁴ If, however, the sheriff had had no other writ than the *pluries* delivered to him, he might make return of that fact, and so excuse himself, for supposed neglect of duty.⁵

§ 14. *Cattle driven within a liberty — the writ non omittas.* If the sheriff's return to the writ showed that the cattle were driven within some liberty, and that the bailiff of the liberty made no answer to his demand for them, the plaintiff might have an *alias* or *pluries non omittas*. This authorized the

abseque hoc; that the property was in the plaintiff, and prayed judgment, and it was found for the plaintiff. Sergeant Harvey moved in arrest of judgment, for in no book was found such a traverse as this; HUTTON, Justice, said this was never seen by him, and they all agreed that judgment shall be for the plaintiff." Anon Winch, 26; Weaver v. Lawrence, 1 Dall. 156.

¹ F. N. B. 68 E.; Gilbert on Replevin, 75.

² F. N. B. 68 E.

³ Gilbert on Replevin, 75; Anon Dyer, 189a; F. N. B. 68; Thomas, of Matyshale, v. The Abbot of Cirencester, Year Book, 30, E. 1, 18. See this case *post*, § 25, note.

⁴ Gilbert on Replevin, 77; F. N. B. 68; Freeman v. Bluet, 12 Mod. 395.

⁵ Gilbert on Replevin, 76, *et seq.*

sheriff to enter the liberty or franchise and deliver the plaintiff's beasts.¹ The clause which sometimes appears in our writs of the present day, "and this you are not to omit, under the penalty of the law," though now nothing more than a rather sonorous form, was once a special and highly essential part of the writ,² without which it would have been useless.³

§ 15. **The writ issued only at Westminster.** The writ of replevin, like all other original writs, could only issue out of chancery at Westminster, the King's chancellor being the only officer in the kingdom who could issue such writs, and Westminster was the only chancery office or place whence they could issue.⁴

§ 16. **Delay in the issuing of the writ occasioned thereby.** Westminster was several days' journey from the extremities of the kingdom. A journey from London to New Castle by land probably occupied as much time then as a journey from New York to San Francisco would now. Something like it occurred in the early history of Illinois, when a court at Kaskaskia sent its writs to Milwaukee. The delay which this occasioned was a serious hardship to the tenant, who was compelled to feed his beasts until a writ could be obtained without having the use of them. It was, moreover, a great detriment to the husbandry of the realm, and in those days agriculture was the sole support of the nation.⁵

§ 17. **Replevin by "plaint," sheriff authorized to proceed**

¹ Gilbert on Replevin, 69, *et seq.* See *post*, § 23, note. F. N. B. 68.

² Gilbert's History and Practice of the Court of Common Pleas, 26, *et seq.* See *post*, § 23 note.

³ Reeve's Hist. Ch. 10, p. 93, (Finlason's Ed.)

⁴ 3 Blackstone, 50 *Ib.* 273; History and Practice of the Court of Common pleas, 15, *et seq.* The mode of commencing a civil suit in the reign of Henry III., as well as in earlier and subsequent times, was by the purchase of a writ. Writs, when issued, were sent by the hands of messengers who traveled through the kingdom and delivered them to the sheriffs of the counties to be served on defendants. Horwood in his preface to the Year Book, 30, 31, E. I. p. 26. Macaulay's History of England, Vol. 1, p. 347, contains a description of the roads and difficulties of travel four hundred years later. In 1700 York was a week distant from London. Lives of the Engineers, p. 23.

⁵ History of England; Potter v. Hall, 3 Pick. 368.

without writ. To remedy this the Statute of Marlbridge was enacted. This statute, as before remarked, was one of the most important in English history, and without doubt the Chapter on Replevin had as marked, lasting and beneficial effect on the laws of Great Britain as any other chapter ever enacted. This chapter (Ch. 21,) gave the sheriff power, upon complaint made to him, without any writ or process from any superior, to deliver to the plaintiff his cattle; or, if they were taken within any liberty, the sheriff might at once enter the liberty to make replevin. In other words, this chapter operated like a general continuing writ of replevin available for all persons in all cases, or it saved the necessity for any writ, and by virtue of its provisions the sheriff, upon complaint made to him, might, upon his own authority, either by word, (for frequently the sheriff of those days could not write,) or by precept to his bailiff, replevy the plaintiff's goods.¹ After the adoption of this statute proceedings by writ gradually fell into disuse, and has long since become obsolete in England. Its use was continued in Ireland some years later.

§ 18. **Proceeding in case of resistance.** Proceedings under this statute were called "Proceedings by Plaint." The sheriff, upon plaint, (*i. e.* complaint,) made to him² went in person, or sent one of his bailiffs, to the place where the cattle were

¹ Ch. 21, Statute Marl. 52 Henry III. A. D. 1267, is as follows: "It is provided, also, that if the beasts of any man be taken and wrongfully withholden the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the sheriff, for default of those bailiffs, shall cause them to be delivered."

These liberties were estates, baronys, towns or monasteries, etc., in which the lord claimed jurisdiction to the exclusion of the King's ordinary writ, the right proceeding frequently from a grant from the King, or immemorial custom. Gilbert's Hist. Com. Pleas, p. 25; Macaulay's Hist. Eng. (Library Ed.) Vol. 1, p. 338. See, also, Ch. 16 and 22 to 25 Fortunes of Nigle, for Scott's highly dramatic account of the immunities of Whitefriars, the most famous of the many liberties of the kingdom.

² The affidavit of modern practice is the "plaint" of ancient practice. *Anderson v. Hapler*, 34 Ill. 436.

detained and demanded sight of them.¹ If this were denied he might raise the hue and cry; or in case of resistance apprehend the offender and put him in jail.² If the distress had been driven into a castle or other stronghold the sheriff, after demand, might break it open to enable him to deliver them.³ The common law privilege which was accorded to a man's house or castle would protect himself or family from arrest, or his goods from seizure on a civil process, but could not protect or privilege him to keep the goods of another person unjustly taken so as to prevent service of the replevin.⁴ The practice of driving distresses into strongholds was so frequent in the wars of the barons, and the poorer men suffered so much, that the Statute of West. 1. Ch. 17 was enacted expressly giving the sheriff power, after demand made, to break into a house, castle, or other stronghold, to make replevin of goods. This statute further to deter lords from refusing to deliver distresses to the sheriff on replevin, provided that the house or castle so used should be razed and destroyed. This, however, could not be done without the King's writ after a fair trial.

§ 19. **In case of no resistance.** If no opposition was made to the sheriff he would immediately, on sight of the beasts, deliver them to the plaintiff and then give the parties a day in which to appear in the county court and try the matter.⁵

§ 20. **Ancient method of trial.** The manner of trying the case anciently was for the plaintiff to have his suitors, *i. e.* witnesses, ready to prove he had offered the lord a pledge, or security, under the impression that that was sufficient, and that the lord had no right to seize or distrain pledges when

¹ Reeve's Hist. Vol. 2, p. 48. It is probable that the sheriff never served such process in person, but that he always sent one of his deputies. Ackworth v. Kempe Douglass, 40; Blackwell v. Hunt, Noy, 107. Perhaps the sheriff executed the writ in person, and sent his bailiff when the suit was begun by plaint. Gilbert on Replevin, 67. The statute, 1 and 2 P. & M. Ch. 12, § 3, required the sheriffs to have at least four bailiffs in each county for the sole purpose of making replevin.

² Reeve's Hist. Vol. 2, p. 48; Britton, Vol. 1, p. 137.

³ This is the statute law in several of the States to-day.

⁴ Gilbert on Replevin, p. 70.

⁵ Reeve's Hist. Vol. 2, p. 48.

sufficient pledges had been tendered him.¹ The form of the writ and declaration in many States to this day contains the words, "Wherefore, he took," etc., and unjustly detains the same "*against the sureties and pledges*," etc. This is a fragment of the old common law practice which still clings to this action, though the reason for it is sometimes forgotten. It tells us of the law of replevin as it was practiced more than six hundred years ago.²

§ 21. **Both parties actors or plaintiffs.** Both parties were called "actors," a term borrowed from the civil law, signifying plaintiff.³ The defendant became an actor by avowing the taking and seeking a return of the goods. The plaintiff, or complainant, might show the taking and detention to be wrongful, and the defendant, or avowant, while he could not deny the taking or detention against the sheriff's return, might show that it was rightful, and demand a return of the goods. Replevin was one of the favorites of the law. In ordinary actions the defendant might have *essoins*, that is, he might send his servant with an excuse and have delay; but an unjust taking and detention of the defendant's goods against gage and pledge was regarded in an unfavorable light. It was against the peace, and but little removed from robbery. The

¹ Reeve's Hist. Vol. 2, p. 46; Gilbert on Replevin, pp. 40, 59, 69. When both parties appear in court the plaintiff shall set forth his plaint that, whereas, he had his beasts, to-wit: two oxen, two horses or two cows, or such chattels, according to the nature of the distress, on such a day, in such a year of our reign, in such a certain place, there came such an one, (the detainer,) and took the same beasts there found, or caused them to be taken by such an one, and drove them away from the same place to another place; and then came the plaintiff and demanded to have his cattle quietly and could not have them, and afterwards tendered security for the sake of peace, and offered pledges to appear in his court, or elsewhere, to stand to justice if he had any demand to make against him, and yet he wrongfully, against gage and pledge, detained them until the same beasts were delivered by the sheriff. Britton. Vol. 1, p. 139.

² Evans v. Brander, 2 H. Bla. 547.

³ Statute Westm. 2, Ch. 2, § 2; Coan v. Bowles, Carth. 122; Anon, 2 Mod. 199, case 118; Yates v. Fassett, 5 Denio, 21; Persse v. Watrous, 30 Conn. 146. Each party may recover judgment against the other for different parts of the property and for damages and costs. Clark v. Keith, 9 Ohio, 73; Seymour v. Billings, 12 Wend. 286.

taker must, therefore, state his reason at the day appointed by the sheriff.¹

§ 22. **Avowry and cognizance.** When the defendant avowed the taking in his own right, as for rent in arrear, setting up the right in his defense, it was called an avowry, and he was called an avowant. When the defendant admitted the taking, but set up the right of another under whose authority he acted, it was called making cognizance, and he was called the cognizor.²

§ 23. **Justified the taking.** The different claims which the avowant might set up as his excuse or justification for taking the goods were numerous. He might avow for rent in arrear, or for damage feasant, or justify the taking under judgment of the lord's court. These and other excuses or justifications the plaintiff could deny, and the question so presented was tried. If the plaintiff was successful in his suit, he was entitled to retain the goods replevied, and to have damages for the wrongful taking and the loss which it occasioned him. If however, the plaintiff failed to sustain his suit, he was in mercy, and might be, and anciently was, fined for his false clamor, and the defendant avowant was entitled to a return of the distress, and by the statute, (21 Henry VIII., Chap. 19,) to damages.³

§ 24. **Removal to the court of King's bench.** Either party might remove the case from before the county court (Sheriff's court) to the court of common pleas, or King's bench; the plaintiff, without showing cause, as the suit was his own; the defendant, upon reasonable cause.⁴ But the removal was allowed for slight cause, and the truth of the cause alleged was

¹ Reeve's Hist. Vol. 2, pp. 48, 49; Gilbert on Replevin, 77, 78; Britton, Vol. 1, p. 137. This, perhaps, simply means that the defendant might have a continuance upon showing cause in ordinary cases, but not in replevin. Glanvil devotes some space to the law of essoins. Glanvil, B. 1, Ch. 22, *et seq.*; Beam's Trans.

² Statute 21, Henry VIII. Ch. 19.

³ Anon, Dyer, 141a; Riccards v. Cornforth, 5 Mod. 366; Woodcroft v. Kynaston, 9 Mod. 305; Gilbert on Replevin, 62; Britton, Vol. 1, p. 140.

⁴ Gilbert on Replevin, 102; 3 Blackstone's Com. 149; Statute Westm. 2, 13, Edward I., Ch. 2, A. D. 1285; Woodcroft v. Kynaston, 9 Mod. 305; Anon Loftus, 520; F. N. B. 69, 70.

not inquired into.¹ Or, if in the course of the proceeding, it appeared that the right of freehold came in question, it must of necessity be removed, as the sheriff could not try it in his county court.² So it became usual to carry up all cases from the sheriff to the courts of Westminster Hall, in the first instance. The usual mode to oust the sheriff of jurisdiction was for the plaintiff to take the *alias* and *pluries*, with the original writ, and deliver only the *pluries* to the sheriff to be served, which, as we have seen, was always returnable.³ The sheriff thereupon returned the writ at once to the superior court. If the proceeding were commenced by writ, the removal was effected by the writ of *pone*, as it was called, from the words of the writ *pone ad petitionem, etc., coram justiciariis nostris*. "Put on the petition, etc., before our justices," etc. If the proceeding had been begun by plaint, the removal was effected by a writ of *recordari*, which was a writ to the sheriff commanding him to make a record of the proceeding before him, and return the record so made before the King's justices at Westminster.⁴ This record gave the justices authority to act, while, in case the proceeding was by writ, the King's writ put before them gave them sufficient authority to proceed.

§ 25. The writ of *withernam*. If the defendant had eluded the distress, driven it out of the county, or had concealed it, then, upon the sheriff's return showing that fact, the plaintiff was entitled to a *capias in withernam*, a writ deriving its name

¹ Gilbert on Replevin, 105. Originally the law seems to have been otherwise. F. N. B. 119, K.

² This does not imply that a freehold was or could be the subject of replevin; but the tenant or plaintiff in replevin would sometimes deny that he held his lands of the avowant, and so require him to prove it, and in this way the title of the lord came in question. Statute Westm. 2, Ch. 2, § 1. Coke's Reports contain many cases in replevin which present this question in some form. *Fordham v. Akers*, 33 L. J. Q. B. 67, holds that county courts may proceed even when title to land is involved, if the defendant does not remove the case.

³ *Ante*, § 12; *Moore v. Watts*, 1 Ld. Raym. 613; *Woodcroft v. Kynaston*, 9 Mod. 305.

⁴ F. N. B. 69, 70; Statute Westm. 2, 13, Edward I., Ch. 2, A. D. 1285. The writ is usually called the *re. fa. lo.*, an abbreviation of the words *recordari facias loquplam*. *Daggett v. Robins*, 2 Blackf. 417.

from two Saxon words, *weder*, other, *naaum*, distress,¹ upon which he might have a second or indemnifying distress, the writ being a command to the sheriff to take *other* cattle or *other* goods of the distrainor and deliver them to the plaintiff, in lieu of his own, wrongfully withholden from him. So, when the defendant had judgment for a return of a distress which had been replevied from him, and the plaintiff had eloigned or concealed the goods, the defendant was entitled to the writ of *withernam*. This was a kind of reprisal or punishment for wrongfully withholding the distress. It was a relic of the *lex talionis* which prevailed at a much earlier period.² Goods taken by this process were not repleviable until the original distress was forthcoming.³

¹ F. N. B. 73 F.; *Moor v. Watts*, 2 Salk, 581; Gilbert on Replevin, 79; Anon Dyer, 188b. The last case found in which this writ is recognized in this country is *Bennett v. Berry*, 8 Blackf. 1. See, also, *Woglam v. Cowperthwaite*, 2 Dall. (Pa.) 68; *Weaver v. Lawrence*, 1 Dall. 167; *Swann v. Shemwell*, 2 Har. & G. (Md.) 283; *McColgan v. Huston*, 2 Nott & M. (S. C.) 444. A proceeding similar in its effect, though not in form, has found a place in Michigan. *Rathbun v. Ranney*, 14 Mich. 387.

² "Let the judgment be this: That he loose the like member as he has destroyed of the plaintiff." Britton, Vol. 1, p. 122. Substantially the same as Exodus, Ch. 21, ver. 24. The writ of *withernam* was not a part of the proceeding in the replevin, but was a kind of punishment. If the defendant came in and pleaded *non cepit*, it would stay the *withernam*, as he is not concluded by the return *elongavit*. *Swann v. Shemwell*, 2 Har. & G. (Md.) 283.

³ I venture to transcribe into this note a case from the Year Book, 30, 31, Edward I., p. 18, not only as a specimen of the ancient style of law reporting, but as illustrating many points in the text. This is one of the first cases, reports of which are accessible. There are a number of cases, some eight or ten years earlier, but none which so vividly illumine the points under discussion. This report also possesses value as showing the highly advanced state of pleading at that early day, and the technical exactness with which the law was administered. It may be remarked, *en passant*, that the amount of litigation in those days, as shown in these early reports, is a matter of astonishment. In one volume, containing about the same number of pages as an ordinary volume of law reports of to-day, may be found twenty-six cases of replevin alone.

Report of the case of The Abbot of Cirencester v. Thomas, of Matyshale. Year Book, 30, 31, Edward I., p. 18, A. D. 1302.

[The names of the Judges are in small capitals, and counsel in italics.]

The Abbot of Cirencester distrained on one Thomas, of Matyshale, in the town of Cirencester. Thomas came into court and [a line in the MS.

§ 26. Defects in the statute of Marlbridge. The Statute of Marlbridge and proceeding by plaint was a vast improvement on the earlier proceeding by writ. Yet certain imperfections in the practical operation of the law remained, occasioning great inconveniences and sometimes injustice. In this, as in other actions at law, and as is the law to this day, a non-suit suffered by the plaintiff did not debar him from again bringing suit on the same cause of action, or prevent the plaintiff in replevin from suing out another replevin for the same property. Advantage of this rule of law was sometimes taken by lawyers of the olden time, who, not unlike their professional brethren of to-day, thought more of a substantial victory for their clients than of abstract questions touching the dignity of the law, and who rather prided themselves on an observance of the technical rules of the law, especially where these rules were found highly advantageous to the case in which they were engaged. It, therefore, frequently happened that when the case was called for trial and the plaintiff saw his opponent with his witnesses ready to proceed, he would

here has been entirely erased,] commenced suing the Abbott. The bailiff of the sheriff came, and wished to liberate Thomas' beasts, and could not, because Cirencester is of the King's ancient demesne, and not guildable to the county court, etc. Wherefore, the county court awarded a distress on the Abbot. Afterwards Thomas brought replevin, etc., and sought delivery. * * * Wherefore, he sued out the replevin "*sicut alias vel causam nobis significetis*," and to this writ the sheriff returned that he had commanded the bailiffs of the liberty of the Abbot of Cirencester [and] that they should [would] do nothing. Wherefore, the "omit not by reason of the franchise" was sued out, etc., and the sheriff, by virtue of this writ, entered the franchise and made deliverance and attached the Abbot, etc., and then the Abbot caused the proceedings to be removed into *banc* by *pone*, and the case ran thus: "That the said Abbot asserts that he took the said beasts in a portion of the appurtenances of his manor of Cirencester, which is of the ancient demesne of the crown of England, for customary, etc., to him due. Thomas and the Abbot came into court. *Asseby* — Counted, etc. *Herle* — Cirencester, where the seizure was made, is of the ancient demesne, etc., where no writ runs, etc., except, etc., and this Thomas is tenant in ancient demesne, etc., and we do not understand that in this court, or elsewhere, at common law, he ought to be answered. *Asseby* — The proceedings were removed here at his own suit, etc., and the plea is attached to this court, etc., and we pray judgment, etc. *Warr* — The place where the seizure was made is holden of the Abbott, etc., and is of the ancient demesnes, etc., and

suffer himself to be non-suited and a return of the property adjudged against him, and would then at once replevy the same goods again, and again suffer a non-suit, and again replevy, and so on *in infinitum*, to the intolerable vexation of the lord. It was also a common occurrence for the tenant, pending the suit in replevin, to sell the cattle and become insolvent. The pledges or securities which the plaintiff gave, and which originally were required to be substantial securities, were only to answer his amercement to the King *pro falso clamor*, and these soon degenerated into bare form; John Doe and Richard Roe, imaginary persons, being the only security required, so that the lord took nothing by his judgment.¹

§ 27. The statute of Westminster and the writ of second deliverance. To remedy these evils the Statute of Westminster, 2, Ch. 2, was enacted in the thirteenth year of Edward

he is tenant in ancient demesne, etc., and this he cannot deny, etc.; and we pray judgment, etc. BEREฟอร์ด—He tells you that out of the ancient demesnes you ought not to be answered on this writ, nor any other, except where you are distrained for services which you do not owe. As for that, there is a certain writ in regular form, etc. *Asseby*—You formerly sued for a return of the chattels, in this court, on the plea, etc., and so this court is seized, etc., and we pray judgment, etc. *Warr*—That was by your non-suit, etc.; for at first you did not come into court; wherefore, we were able to challenge this proceeding, etc. BEREฟอร์ด's reply to his statement—That you are of the King's ancient demesnes within which, etc., the seizure was made, etc. *Asseby*—We cannot deny that Cirencester where the seizure was made, is of the ancient demesnes, etc.; but we tell you that we hold the tenements where the seizure was made, of the Abbot, by the services of XXVIII d; by the year, in lieu of all services. *Warr*—How do you prove it? *Asseby*—Ready—*Warr*—Since you have admitted that Cirencester is of the ancient demesnes, etc., and that you are tenant, etc., and do not show that these tenements have been enfranchised, etc., we pray judgment, etc. BEREฟอร์ด, (to *Asseby*.)—Have you any deed to evidence what you have alleged, etc.? *Asseby*—Ready, etc. BEREฟอร์ด—Since, etc., (as above, in the reply,) the court adjudges that the Abbot goes quit, without day, and that you, etc., by your writ, but are in mercy, etc. *Warr*—We pray the return. BEREฟอร์ด—You shall not have it from us; but when you get to the inn do to your arch villian what you please, etc.

¹ 3 Inst. p. 9; 3 Blackstone, 274, 287; *Baker v. Philips*, 4 Johns. 190. "Pledgii" in the old books signified securities. *Evans v. Brander*, 2 H. Bla. 547.

I., A. D. 1285.¹ The statute also provided that the sheriff should not only take security for the suit, but also "for the beasts or cattle to be returned, or the price of them, if return be awarded." Here is the first appearance among our laws of the bond or security for the return of the goods to the defendant in replevin, and is substantially the same as we have it at the distance of nearly six hundred years. The Statute of 11 George II., Ch. 19, §§ 22, 23, being only explanatory, and in aid of the provisions of the Statute of Westminster and the Statute Westminster also provided against replevins *in infinitum*.

¹ By the recent publication of old manuscript reports of a case in the time of Edward I., it appears that HENGHAM was the author of this statute. Horwood's preface to his translation of Year Book, 30, 31, E. I. p. 31. The chapter cited it as follows:

I. Forasmuch as lords of fees distraining their tenants for services and customs due unto them, are many times grieved because their tenants do replevy the distress by writ, or without writ, and when the lords at the complaint of their tenant do come by attachment into the county, or unto another court having power to hold pleas of replevin, and do avow the taking good and lawful by reason that the tenants disavow to hold aught, nor do claim to hold anything of him (which took the distress and avowed it,) he that distrained is amerced and the tenants go quit, to whom punishment cannot be assigned for such disavowing by record of the county, or of other courts having no record.

II. It is provided and ordained from henceforth, that where such lords cannot obtain justice in counties, and such manner of courts against their tenants, as soon as they shall be attached at the suit of their tenants, a writ shall be granted to them to remove the plea before the justices, before whom, and none other, where justice may be ministered unto such lords, and the cause shall be put in the writ, because such a man distrained in his fee for services and customs to him due. Neither is this act prejudicial to the law commonly used, which did not permit that any pleas should be moved before justices at the suit of the defendant. For though it appear at the first show that the tenant is plaintiff and the lord defendant, nevertheless, having respect to that, that the lord hath distrained, and sueth for services and customs being behind, he appeareth indeed to be rather actor or plaintiff than defendant. And to the intent the justices may know upon what fresh seizin the lords may avow the distress reasonable upon their tenants. From henceforth it is agreed and enacted, that a reasonable distress may be avowed upon the seizin of any ancestor or predecessor since the time that a writ of novel disseizure hath run. And because it chaunceth sometimes that the tenant, after he hath replevied his beasts, doth sell or alien them, whereby return cannot be made unto the lord that distrained if it be adjudged.

tum by awarding the avowant a return of the cattle after a non-suit of the plaintiff, to hold irreplevible except by a writ issuing upon the records of the justices before whom the suit in replevin was tried. The writ of *retorno*, in such cases, after the order for return, contained a clause as follows: "And that you do not again deliver them upon complaint of ——— (the plaintiff,) without our writ, which should expressly mention the aforesaid judgment." The goods returned by virtue of this writ were not again subject to replevin at the suit

III. It is provided that sheriffs or bailiffs from henceforth shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts if return be awarded. And if any take pledges otherwise he shall answer for the price of the beasts, and the lord that distrained shall have his recovery by writ; that he shall restore unto him so many beasts or cattle. And if the bailiff be not able to restore, his superior shall restore. And forasmuch as it happeneth sometime that after the return of the beasts is awarded unto the distrainer, and the party so distrained, after the beasts be returned, doth replevy them again, and when he seeth the distrainer appearing in the court ready to answer him does make default, whereby a return of the beasts ought to be awarded again unto the distrainer, and so the beasts be replevied twice or thrice, and infinitely, and the judgments given in the King's courts take no effect in this case, whereupon no remedy hath been yet provided; in this case, such process shall be awarded, that as soon as the return of the beasts shall be awarded to the distrainer the sheriff shall be commanded by a judicial writ to make return of the beasts unto the distrainer, in which writ it shall be expressed that the sheriff shall not deliver them without writ making mention of the judgment given by the justices, which cannot be without a writ issuing out of the rolls of the said justices before whom the matter was moved. Therefore, when he cometh unto the justice and desireth replevin of the beasts, he shall have a judicial writ that the sheriff taking surety for the suit, and also of the beasts, or cattle, to be returned, or the price of them (if return be awarded,) shall deliver unto him the beasts or cattle before returned, and the distrainer shall be attached to come a certain day before the justices afore whom the plea was moved in the presence of the parties. And if he that replevied make default again, or for another cause, return of the distress be awarded; being now twice replevied, the distress shall remain irrepleviable. But if a distress be taken of new, and for a new cause, the process aforesaid shall be observed in the same new distress to the avowant, and were irrepleviable, except by a writ mentioning the former judgment, which was called a writ of second deliverance.

This statute is local to Great Britain and does not apply in this country. Daggett v. Robins, 2 Blackf. 417.

of the same party, except upon a writ of second deliverance which recited the former judgment, and this writ only issued upon cause shown, and not as a matter of course.¹

§ 28. **Statute Charles II.** The Statute of Charles II., Ch. 7, A. D. 1665, provided that when the plaintiff in replevin was non-suited, or judgment be given against him, a writ of inquiry should issue to ascertain how much rent was in arrear to the distrainor and also the value of the distress, and he was entitled to judgment for the sum due as rent, or to so much as the value of the distress, with execution therefor, with a right to distrain again for the amount unpaid and in arrear.

§ 29. **Statute George II.** The Statute 11 George II., Ch. 19, § 23, provided that all officers granting replevins should, in any replevy of a distress, take a bond from the plaintiff with two responsible securities, and in double the value of the goods, conditioned for the prosecution of the suit and return of the goods in case return be awarded, and provided that the sheriff might endorse the bond to the avowant, or person making cognizance, who might sue on it in his own name, and that the court by rule should give such relief as was agreeable to justice.

§ 30. **Conclusion.** This brings the history of the action down to a comparatively modern time. In this sketch of the history of the law of replevin, as it was formerly practiced, the author has been compelled to omit all details, as well as many matters of general import; he has endeavored to state only sufficient to give an idea of the origin of the action, and to indicate some of the principal steps by which it has grown from a half civilized contest, in which outrage was a prominent ingredient, in cases when the sole question was the right to a distress, into a ready instrument for the settlement of almost all disputes concerning the ownership and possession of personal property.

¹ The writ of replevin was a writ of right, and issued of course. The writ of second delivery was a writ of grace, or favor. Anon, 2 Atk. 237.

CHAPTER II.

GENERAL PRINCIPLES.

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§ 31. **Definition.** Replevin is an action at law for the recovery of specific personal chattels¹ wrongfully taken and

¹ Rogers v. Arnold, 12 Wend. 34; Hickey v. Hinsdale, 12 Mich. 100; Meudelson v. Smith, 27 Mich. 2; Travers v. Inslee, 19 Mich. 101; Bacon v. Davis, 30 Mich. 157; Badger v. Phinney, 15 Mass. 362; Philips v. Harriss, 3 J. J. Marsh. (Ky.) 123; Buckley v. Buckley, 9 Nev. 379; McFerrin v. Perry, 1 Sneed, (Tenn.) 314; Scott v. Elliott, 63 N. C. 215; Barksdale v. Appleberry, 23 Mo. 390. "The only effective remedy for the recovery of personal chattels." Kingsbury's Exrs. v. Lane's Exrs., 21 Mo. 115. "The object of the writ is to re-deliver or restore goods to the possession of the

detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned.¹

person who has the general or special property." *Lathrop v. Cook*, 14 Me. 415. To same effect, *Yates v. Fassett*, 5 Denio, 21; *Pangburn v. Patridge*, 7 John. 140; *Harwood v. Smethurst*, 5 Dutch. (29 N. J. L.) 197. "The appropriate remedy, in all cases where the plaintiff seeks to try title to personal property and recover possession." *McKinzie v. Balt. & Ohio R. R.*, 28 Md. 161. "The proper remedy in all cases where the plaintiff has a right to the immediate and exclusive possession of chattels which he wishes to recover." *Cullum v. Bevans*, 6 Har. & J. (Md.) 469; *Brooke v. Berry*, 1 Gill. (Md.) 153; *Pattison v. Adams*, 7 Hill, 126; *Johnson v. Carnley*, 6 Seld. (N. Y.) 570; *Isley v. Stubbs*, 5 Mass. 280; *Badger v. Phinny*, 15 Mass. 362; *Baker v. Fales*, 16 Mass. 147; *Shannon v. Shannon*, 1 Sch. & Lef. (Irish,) 318; *Peirce v. Hill*, 9 Port. (Ala.) 151; *Shaddon v. Knott*, 2 Swan, (Tenn.) 358; *Robinson v. Richards*, 45 Ala. 354; *Town v. Evans*, 1 English, (6 Ark.) 260; *Paul v. Luttrell*, 1 Colorado, 317. "The action has been liberally extended, and now embraces every case of personal property which is in the possession of one person and is claimed by another." *Snyder v. Vaux*, 2 Rawle, 423. See, also, *Keite v. Boyd*, 16 S. & R. (Pa.) 300; *Sprague v. Clark*, 41 Vt. 6; *Stoughton v. Rappalo*, 3 S. & R. (Pa.) 559; *York v. Davis*, 11 N. H. 241; *Harlan v. Harlan*, 15 Pa. St. 513; *Mackinley v. McGregor*, 3 Whart. (Pa.) 369; *Woods v. Nixon*, Addis, (Pa.) 134. "Lies at the instance of a party where property has been improperly seized by an officer on legal process." *Gimble v. Ackley*, 12 Iowa, 27; *Wilson v. Stripe*, 4 G. Greene, 551; *Cooley v. Davis*, 34 Iowa, 129; *Smith v. Montgomery*, 5 Iowa, 370; *Chinn v. Russell*, 2 Blackf. (Ind.) 176; *Marchman v. Todd*, 15 Ga. 25; *Miller v. Bryan*, 3 Iowa, 58; *Shearick v. Huber*, 6 Binn. (Pa.) 3.

¹ *Herdic v. Young*, 55 Pa. St., 176; *Mitchell v. Burch*, 36 Ind. 535; *Newell v. Newell*, 34 Miss. 385; *Hotchkiss v. Jones*, 4 Porter, (Ind.) 260; *Hart v. Fitzgerald*, 2 Mass. 510; *Scott v. Elliott*, 63 N. C. 215; *Kendal v. Fitts*, 2 Foster, (N. H.) 1; *Cumberland Coal & Iron Co. v. Tilghman*, 13 Md. 74; *Messer v. Baily*, 11 Foster, (31 N. H.) 9; *McKean v. Cutler*, 48 N. H. 371; *Bell v. Bartlett*, 7 N. H. 178; *Peyton v. Robertson*, 9 Wheat. 527; *Morgan v. Reynolds*, 1 Blake, (Montana,) 164. The action is not for the recovery of damages or value, except as an incident to the action for the specific thing; but it is not strictly confined to the recovery of the thing, nor is judgment for the property essential. Damages may sometimes be given in lieu of the property; otherwise, upon the death or destruction of the property, pending the suit, the action would fail. *Barksdale v. Appleberry*, 23 Mo. 390; *Mackinley v. McGregor*, 3 Whart. 370. And, again, if one hire a horse for a year, and pending the time the horse be taken by one without right, the lessee may bring replevin; but if the property be not delivered on the writ, and after the year expires, and before judgment, the taker surrenders it to the owner, the lessee may recover damages for the detention, but not necessarily judgment for the property or its value. *Cole v. Conolly*, 16 Ala. 271.

§ 32. **Replevin lies for chattels wrongfully detained.** It lies for all goods and chattels wrongfully taken or detained, and may be brought whenever one person claims chattel property in the possession of another, whether his property in the goods be absolute or qualified, provided he has the right of possession at the time the suit is begun.¹

§ 33. **Recovery of specific goods the primary object, and of value or damages, the secondary.** The primary object of the action is to recover the specific chattels which have been wrongfully taken or detained.² Though judgment for damages usually follows a judgment for the property as a matter of course, the contest is about the specific thing; the recovery of the thing, and not the damages, is the primary object.³ The secondary object is to recover a sum of money which shall be equivalent to the value of the property sued for, in case the property itself is not delivered to the plaintiff upon the writ; compensation for the injury which the plaintiff has sustained by the wrongful detention of his goods is also recoverable, as in cases when the goods themselves are recovered.⁴ It may

¹ *Harlan v. Harlan*, 15 Pa. St. 507; *Lazard v. Wheeler*, 22 Cal. 140; *Weaver v. Lawrence*, 1 Dall. (Pa.) 156; *Clark v. Skinner*, 20 Johns. 467; *Shearick v. Huber*, 6 Binn. 3; *Stoughton v. Rappallo*, 3 S. & R. (Pa.) 562; *Williams v. West*, 2 Ohio St. 83. The action was formerly limited to cases of wrongful distress, but has long since outgrown its original limits, and now lies in all cases of unlawful taking and detention of goods. *Osgood v. Green*, 10 Fost. (N. H.) 210; *Daggett v. Robins*, 2 Blackf. (Ind.) 415; *Sprague v. Clark*, 41 Vt. 6; *Chinn v. Russell*, 2 Blackf. (Ind.) 172; *Meany v. Head*, 1 Mason C. C. 319. See *Bofil v. Russ*, 3 Strobb. (S. C.) 98. "It lies for goods unlawfully detained, though there may have been no tortious taking." *Marston v. Baldwin*, 17 Mass. 609; *Peirce v. Hill*, 9 Port. (Ala.) 151; *Paul v. Luttrell*, 1 Colorado, 317. *Contra*, *Cummings v. MacGill*, 2 Murphey, (N. C.) 359; *Dickson v. Mathers*, Hempst. C. C. 65; *Duffy v. Murrill*, 9 Ired. (N. C.) 46. "The gist of the action is the wrongful detention." *Benje v. Creagh's Admrs.*, 21 Ala. 151. When goods are wrongfully detained upon a warrant which has been quashed or set aside by the court, replevin lies by the owner. *Slayton v. Russell*, 30 Ga. 127.

² *Herdie v. Young*, 55 Pa. St. 176.

³ *Hunt v. Robinson*, 11 Cal. 277; *Nickerson v. Chatterton*, 7 Cal. 568; *Buckley v. Buckley*, 12 Nevada, 426.

⁴ *Ellis, Admr. of Pritchard, v. Culver*, 2 Harr. (Del.) 129; *Hart v. Fitzgerald*, 2 Mass. 509; *Bruen v. Ogden*, 6 Halst. (N. J.) 371; *Buckley v. Buck-*

be said to be the proper form of action, in all cases where the plaintiff, having a general or special property, with the right to the immediate possession of chattels personal which are wrongfully detained by another, desires to recover the specific goods, and this without reference to whether they were wrongfully taken or not. The wrongful detention of another's goods will generally, under the statutes and decisions in this country, render the defendant liable in this action.¹

§ 34. It is a mixed action, partly in rem and partly in personam. It is a mixed action, being not only for specific articles but for damages which the taking and detention has occasioned.² It is a proceeding partly *in rem* and partly *in personam*. Inasmuch as it seeks the return of specific chattels it is a proceeding *in rem*, resembling a libel in a court of admiralty, both parties being claimants;³ and so far as the object is to obtain a judgment against the defendant for damages is a proceeding *in personam*,⁴ and can be brought only against the person having possession or control of the goods at the time the suit is begun. The writ in addition to the order for delivery, contains a summons to the defendant, and if the plaintiff does not obtain delivery of the goods upon the writ, he may have judgment for the value against the defendant personally.⁵

ley, 12 Nevada, 426; Yates v. Fassett, 5 Denio, 21; Burr v. Daugherty, 21 Ark. 559; Gray v. Nations, 1 Ark. 559; Whitfield v. Whitfield, 40 Miss. 352; Broadwater v. Darne, 10 Mo. 278; Loomis v. Tyler, 4 Day, (Conn.) 141; Frazier v. Fredericks, 4 Zab. (N. J.) 163; Smith v. Houston, 25 Ark. 184; Parham v. Riley, 4 Coldw. (Tenn.) 5; Stevens v. Tuite, 104 Mass. 332.

¹ Peirce v. Hill, 9 Port. (Ala.) 151; Brooke v. Berry, 1 Gill. (Md.) 153; Marston v. Baldwin, 17 Mass. 609; Paul v. Luttrell, 1 Colorado, 317; Brownell v. Manchester, 1 Pick. 233.

² Fisher v. Whoolery, 25 Pa. St. 197; Herdic v. Young, 55 Pa. St. 176.

³ Brown v. Smith, 1 N. H. 38; Wheeler v. Train, 4 Pick. 168; Fletcher v. Wilkins, 6 East. 233; Sharp v. Whittenhall, 3 Hill, (N. Y.) 576; Eaton v. Southby, Willes, 131; Baldwin v. Cash, 7 Watts & S. 425; Lowry v. Hall, 2 W. & S. (Pa.) 132.

⁴ Ramsdell v. Buswell, 54 Me. 547; Burr v. Daugherty, 21 Ark. 559; Daggett v. Robins, 2 Blackf. (Ind.) 416; Stevens v. Tuite, 104 Mass. 332.

⁵ Bower v. Tallman, 5 W. & S. (Pa.) 561. In some of the States the plaintiff may file a count in trover for such goods as the officer returns he cannot find, but in most of the States the value of the chattels is given in

§ 35. **The writ is a writ of right.** By the common law the writ was a writ of right, not of grace or favor,¹ and in most of the States the common law is recognized as the foundation of the action, the statutes only adapting the remedy to the wants of modern society.²

§ 36. **Form of proceeding in different States substantially the same.** So far as its name is concerned this action has been abolished in most, if not all, of the States which have adopted a code.³ It was never recognized in Alabama.⁴ It obtained a foothold in Mississippi only after a struggle.⁵ In Connecticut and Vermont it was formerly allowed only in cases of distress and attachment.⁶ In South Carolina the writ would only lie for a distress.⁷ In Virginia it was abolished by statute, except in cases of distress.⁸ In Louisiana, where the civil law prevails, the writ is unknown; and the same may be said of Texas. But in States adopting a code, provisions are made by which substantially the same results are reached. This is done by what is claimed to be a more simple and equitable proceeding, and one in which the same principles

the form of damages in the replevin suit. See *Greenwade v. Fisher*, 5 B. Mon. (Ky.) 167. In Minnesota it was held so far a proceeding *in rem* before a justice of the peace that delivery of the goods was necessary to give jurisdiction, and that upon a return of "no property found" the justice could not proceed. *St. Martin v. Desnoyer*, 1 Minn. 41.

¹ *Anon.*, 2 Atk. 237.

² *Chadwick v. Miller*, 6 Iowa, 34.

³ "The form of the action was abolished by the code, but the principles which governed it remain, and now, as much as formerly, control in determining the rights of parties." *Eldridge v. Adams*, 54 Barb. 417. To the same effect, *Collins v. Hough*, 26 Mo. 152; *Chadwick v. Miller*, 6 Iowa, 34.

⁴ *Smith v. Crockett*, Minor, (Ala.) 277, (1824); *Peirce v. Hill*, 9 Porter, (Ala.) 155.

⁵ In *Wheelock v. Cozzens*, 6 How. (Miss.) 281, one of the counsel says he would as soon expect to see the court recognize the obsolete remedy of wager of battle, or wager of law, as replevin. See, also, a similar remark by counsel in Virginia. *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491.

⁶ *Watson v. Watson*, 9 Conn. 140; *Watson v. Watson*, 10 Conn. 75. Against the attachment creditors, and not against the officer. *Bowen v. Hutchings*, 18 Conn. 550; *Glover v. Chase*, 27 Vt. 533.

⁷ *Hewitson v. Hunt*, 8 Rich. (S. C.) 106. See *Charleston v. Price*, 1 McCord, 299; *Byrd v. O'Hanlin*, 1 Mill. (S. C.) 401.

⁸ *Vaiden v. Bell*, 3 Rand. (Va.) 448.

apply.¹ In Alabama the action of detinue has been modified and made to serve the same purpose as replevin, and is, in fact governed by the same general principles.² In Georgia the writ is called "possessory warrant," and differs somewhat in form from the common law writ,³ while Louisiana and Texas recognize the principles which govern actions of replevin in a proceeding by sequestration.⁴ In Vermont and Connecticut, as a suit to try the title to property, it has only been allowed within a comparatively recent period.⁵ In Pennsylvania, it is said, the action rests solely upon the local statutes, there being no right to proceed under the common law or the Statute of Marlbridge,⁶ though the common law principles apply. But, whether they be of ancient or modern origin, all laws governing actions for the recovery of specific personal chattels can best be discussed under the title of replevin.

§ 37. **Peculiarities of the action; privileges to the plaintiff.** There are some peculiar privileges to the plaintiff in this action. Upon affidavit being filed that he is the owner of the property in controversy, and entitled to its immediate possession, he can demand that it be delivered to him under the first process issued in the case, leaving the title or right of possession to be investigated afterwards. In no other form of action has the plaintiff this right.⁷ The bond which the plaintiff is required to give is regarded as a sufficient indemnity to the defendant in case the result of the trial shall show the title of

¹ "The name replevin is much more convenient and suggestive to the profession than that adopted by the code." *Ames v. Miss. Boom Co.*, 8 Minn. 467. See *Belkin v. Hill*, 53 Mo. 493; *Pulis v. Dearing*, 7 Wis. 221; *Porter v. Willet*, 14 Abb. Pr. Rep. 319; *Collins v. Hough*, 26 Mo. 149; *Chadwick v. Miller*, 6 Iowa, 34.

² *Peirce v. Hill*, 9 Porter, (Ala.) 151; *Lawson, Admr. v. Lay, Exrs.*, 24 Ala. 188.

³ *Mills v. Glover*, 22 Geo. 322; Stat. Geo. Title, Poss. War.

⁴ *Fowler v. Stonum*, 6 Texas, 61; *Porter v. Miller*, 7 Texas, 473.

⁵ Compare *Collamer v. Page*, 35 Vt. 387; *Bennett v. Allen*, 30 Vt. 686; *Glover v. Chase*, 27 Vt. 533; *Sprague v. Clark*, 41 Vt. 6.

⁶ *Weaver v. Lawrence*, 1 Dall. 156; *English v. Dalbrow*, 1 Miles, (Pa.) 160.

⁷ *Hunt v. Chambers*, 1 Zab. (N. J.) 624; *Yates v. Fassett*, 5 Denio, 31; *Kingsbury's Exrs. v. Lane's Exrs.*, 21 Mo. 117; *Creamer v. Ford*, 1 Heisk. (Tenn.) 308; *Lowry v. Hall*, 2 W. & S. (Pa.) 129.

the latter to be superior; and for the purpose of asserting his title, the defendant is permitted to set it up by his pleading, and to claim its return, and to require the plaintiff to prove affirmatively his title or right to possession when the suit was begun.¹

§ 38. **Importance of the action.** The remedy has been called a violent one.² The transfer of the subject of the dispute from the defendant to the plaintiff, upon the first process, leaving the question of title to be determined afterward, is, without doubt, a proceeding liable to abuse, and has probably been made use of to deprive the real owner of his property; yet it has frequently been found to be the only remedy of any real value to the owner of property which has been wrongfully taken or detained from him. In cases where the defendant is irresponsible, or where the identical property must be put to some special immediate use, or where the property is an heirloom, or has some peculiar value to the plaintiff, the necessity of this action has long been apparent. Through a series of legislative acts, and the liberal construction of the courts, it has become a common remedy; indeed, almost the only effective one in cases wherein the plaintiff is entitled to specific chattels, and prefers a recovery in specie, or where, for any cause, he prefers the property to the risks to which the insolvency or knavery of the defendant might expose him, should he have judgment for damages only.³ It is sometimes the only adequate remedy of any kind available when property is withheld. When one owns goods which are in the possession of another, he cannot sue in assumpsit for them, or for their value, but must sue for them in replevin, or for their

¹ *Mennie v. Blake*, 6 E. & B. (88 E. C. L.) 843.

² *Hutchinson v. McClellan*, 2 Wis. 17. See, also, *Mennie v. Blake*, 6 E. & B. (88 E. C. L.) 846; *Tift v. Verden*, 11 S. & M. (Miss.) 160. Imprisonment is sometimes allowed. *Tomlin v. Fisher*, 27 Mich. 525.

³ *Badger v. Phinney*, 15 Mass. 362; *Town v. Evans*, 1 Eng. (Ark.) 263; *Ames v. Miss. Boom Co.*, 8 Minn. 467; *Kingsbury's Exrs. v. Lane's Exrs.* 21 Mo. 117; *Hunt v. Chambers*, 21 N. J. 624; *Clark v. Skinner*, 20 Johns. 467; *Travers v. Inslee*, 19 Mich. 101; *Weaver v. Lawrence*, 1 Dall. 156. Replevin is the only effective remedy when the goods are in the hands of a worthless defendant. *Tibbal v. Cahoon*, 10 Watts, 232; *Pettygrove v. Hoyt*, 11 Me. 66; *Mennie v. Blake*, 6 Ell. & Bla. (88 E. C. L.) 849.

value in trover. In the latter case, if the defendant is insolvent, the judgment is of no value, and the plaintiff is subject not only to the loss of his goods, but to the burden of a suit.¹

§ 39. The right to present possession the chief question at issue. Though conflicting titles may well be settled in this form of proceeding, it is chiefly a possessory action, the right to present possession of the property being the principal question in controversy.² And where the title is investigated, it is frequently with a view to determine the right of possession, which is in dispute in all cases of replevin. Ownership of chattels usually draws to it the right of possession. Proof of ownership would warrant the inference that the owner was entitled to possession; but a right of possession may be shown independent of or superior to the owner's rights. Thus, if one hire a horse for a stated time, and the owner should retake possession while the contract of hiring was in force, the hirer might sustain replevin.

§ 40. Statutory provisions allowing the defendant to retain possession. In many of the States statutory provisions exist, whereby the defendant is allowed a reasonable time within which to give bond to secure the plaintiff and retain the property in his own possession until the questions at issue are determined. This eminently just provision is but a return to the principles of the common law which were in force in the earliest times.³

¹ Creel v. Kirkham, 47 Ill. 345; Johnston v. Salisbury, 61 Ill. 317; Bethlehem, etc., v. Perseverance Fire Co., 81 Pa. St. 446; Gray v. Griffith, 10 Watts, (Pa.) 431; Mendelsohn v. Smith, 27 Mich. 2. See the old case of *Lindon v. Hooper*, Cowp. 415, where it was held that if a party pays money for the release of his cattle, wrongfully distrained, he cannot recover it.

² Heeron v. Beckwith, 1 Wis. 20; Rose v. Cash, 58 Ind. 278; Hunt v. Chambers, 1 Zab. (21 N. J.) 624; McCoy v. Cadle, 4 Clark, (Iowa,) 557; Johnson v. Carnley, 6 Seld. (N. Y.) 578; Corbitt v. Heisey, 15 Iowa, 296; Seldner v. Smith, 40 Md. 603; Hickey v. Hinsdale, 12 Mich. 100; Smith v. Williamson, 1 Har. & J. (Md.) 147; Childs v. Childs, 13 Wis. 17; Jackson v. Sparks, 36 Geo. 445.

³ Lisher v. Pierson, 11 Wend. 58; Mitchell v. Hinman, 8 Wend. 667. If the defendant claimed the property, the sheriff could proceed no further. The writ *de proprietate probando* was then sued out to determine the ownership. See *ante*, § 12.

§ 41. **Formerly, would lie only for a distress.** Blackstone says the action would lie only for the recovery of a wrongful distress.¹ This statement has been criticised in a number of modern cases.² While there is nothing in the form of the writ which necessarily confines it to cases of distress,³ there are many excellent reasons for accepting the statement of Justice Blackstone in preference to his critics. All the early writers speak of replevin simply as the remedy for a wrongful distress,⁴ and it does not seem to be referred to in any other connection until after Blackstone wrote, "*A replegari* lyeth, as Littleton here teacheth us, when goods are distrained and impounded," etc.⁵ Britton, one of the earliest authorities, lays down the law as follows: "But to the intent that beasts and other *distresses* may not be long detained, we have granted that the sheriff, by simple plaints and by pledges, may deliver such distresses."⁶ In twenty-six sections, which Britton devotes to this subject, there is no intimation that the writ would lie for any other purpose than the recovery of a distress.⁷ Gilbert treats of the action simply as the remedy for the recovery of a distress. The title of the work usually cited as Gilbert on Replevin, is, "The Law and Practice of Distress and Replevin." The second chapter of this work begins as follows: "Having, in the foregoing chapter, shown in what cases a distress or pledge may be taken, and how it is to be disposed of, the next thing in order to be treated of is the remedy given the party to controvert the legality of such caption, in order

¹ 3 Black. Com. 146.

² *Herdic v. Young*, 55 Pa. St. 177; *Daggett v. Robins*, 2 Blackf. (Ind.) 416; *Chinn v. Russell*, 2 Blackf. (Ind.) 173, note 3; *Shannon v. Shannon*, 1 Sch. & Lef. 327; *Pangburn v. Patridge*, 7 Johns. 140; *Bruen v. Ogden*, 6 Halst. (N. J.) 373; *Caldwell v. West*, 1 Zab. 420; *Reist v. Heilbrenner*, 11 S. & R. (Pa.) 132. The old authorities are, that replevin lies only for goods taken tortiously. *Harwood v. Smethurst*, 29 N. J. L. 195; *Cullum v. Bevans*, 6 Har. & J. (Md.) 469.

³ See *ante*, § 11, note 1.

⁴ Britton, Vol. 1, 136, *et seq.*; F. N. B. 156; Gilbert on Replevin; Cowell Interp. Title Replevin.

⁵ Co. Litt. 145*b*.

⁶ Britton, Nichols' Trans. Vol. 1 p. 136.

⁷ This agrees with Bracton, 105*b*, and Fleta, 94*a*.

to bring back the pledge to the proprietor in case the distress were unlawfully taken, and without just cause."¹

§ 42. *The same.* Of something like a hundred cases reported in the time of Edward I., not one is believed to exist that was for any other cause than the recovery of a distress.² The name replevin, from *replegari*, to "take back the pledge," renders it almost certain that the action was originally used to recover goods wrongfully seized as a pledge or security; such seizures, in the ancient law, were always called distresses. Considering these authorities, together with the fact that the ancient common law gave an appeal of felony in cases where goods were seized otherwise than as a distress, as well as for goods which the distrainer claimed to own;³ also, that the action of detinue was for goods bailed to, and wrongfully detained by, the defendant, and that the action of trover enabled the plaintiff to recover the value of goods wrongfully converted, replevin seems, by the harmony of the ancient law, confined solely to cases of distress.⁴

§ 43. *The same.* Viewed in the light of these authorities, it would seem that replevin by the common law was an action to test the legality of a distress; that it would lie in no other case; and it admits of no doubt that under the statutes and decisions of the courts in modern times, the settled and prevailing doctrine is that the action lies for any wrongful taking or unlawful detention of the goods of another.⁵

¹ See, also, *Mennie v. Blake*, 6 Ell. & Bla. (88 E. C. L.) 842. Replevin is a personal action, to try the legality of a distress. *Eaton v. Southby*, Willes, 134. See, also, *Ilsley v. Stubbs*, 5 Mass. 280; Bro. Abr. & Roll. Abr.; Cowell's Interp.; Jacobs' Law Dic., this title.

² Year Books, Edward I., *passim*.

³ See *ante*, § 1, note 2, and § 12 and notes.

⁴ The Statute 11 Geo. II., Ch. 19, providing for bond, applies only in cases of replevin of distress for rent. *Knapp v. Colburn*, 4 Wend. 618; Statute 11 Geo. II., Ch. 19.

⁵ In addition to cases before cited, see *Pangburn v. Patridge*, 7 Johns. 140; *Hopkins v. Hopkins*, 10 Johns. 369; *Gardner v. Campbell*, 15 Johns. 401; *Cullum v. Bevans*, 6 H. & J. (Md.) 469; *Clark v. Skinner*, 20 Johns. 467; *Rogers v. Arnold*, 12 Wend. 30; *Wheeler v. McFarland*, 10 Wend. 318; *Ilsley v. Stubbs*, 5 Mass. 283; *Benje v. Creagh's Admr.* 21 Ala. 151; *Trapnall v. Hattier*, 1 Eng. (Ark.) 21; *Dudley v. Ross*, 27 Wis. 680.

§ 44. **Similarity of this action to trespass, trover and detinue.** A clearer understanding of the law of replevin will be gained by considering it as belonging to the same class of cases as trespass, trover and detinue; that while the form of proceeding is different, and the results are not the same, these actions are strictly analagous in all their governing principles.¹ "Replevin at common law is distinguished from trespass," says COLERIDGE, J., "in this, among other things, that while the latter is intended to procure compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former action is to procure the restitution of the goods themselves, and it effects this by a preliminary *ex parte* interference by the officers of the law with the possession. * * * As a general rule, it is just that a party in the peaceable possession of goods should remain undisturbed, either by parties claiming adversely, or by the officers of the law, until the right be determined and the possession shown to be unlawful; but where, either by distress or by merely a strong hand, the peaceable possession has been disturbed, an exceptional case arises, and it is thought just that even before any determination of the right the law should interfere to place the parties in the condition in which they were before the act was done, security being taken that the right shall be tried and the goods forthcoming to abide the decision."²

¹ *Holbrook v. Wight*, 24 Wend. 169; *Marshall v. Davis*, 1 Wend. 109; *Wickliffe v. Sanders*, 6 T. B. Mon. (Ky.) 296; *Chapman v. Andrews*, 3 Wend. 242; *Heard v. James*, 49 Miss. 236; *Rogers v. Arnold*, 12 Wend. 30; *Briggs v. Gleason*, 29 Vt. 78; *Rector v. Chevalier*, 1 Mo. 345.

² *Mennie v. Blake*, 6 Ellis & B. (88 E. C. L.) 842. "It bears a strong resemblance to trover." *Hisler v. Carr*, 34 Cal. 641. The rule in trespass and trover which allows a return to be shown in mitigation of damages is applicable to replevin; exceptions stated. *Cary v. Hewitt*, 26 Mich. 228. "The same principles govern in trover and replevin." *Parmalee v. Loomis*, 24 Mich. 243. "When the taking was illegal the action was by replevin; when detention only was complained of the remedy was by detinue." *Dame v. Dame*, 43 N. H. 37. "The action is like trover in principle." *Sanford Manf'g Co. v. Wiggin*, 14 N. H. 441. "Where trespass or trover lies for the conversion, replevin will lie for the goods." *Sawtelle v. Rollins*, 23 Me. 196. See, also, *Shannon v. Shannon*, 1 Sch. & Lef. 324; *Clark v. Skin-*

§ 45. Characteristics of this action compared with those of trover and trespass. Trover, by the common law, supposed a casual loss by the plaintiff, and a finding and conversion by

ner, 20 Johns. 467; Rowell v. Klein, 44 Ind. 294; Vanderburgh v. Bassett, 4 Minn. 243. "Same proof required as in trover." Ingalls v. Bulkley, 13 Ill. 317. "Replevin and trover concurrent; different in judgment only." Allen v. Crary, 10 Wend. 349; Beebe v. De Baun, 3 Eng. (Ark.) 510. "Analagous to trespass." Daggett v. Robins, 2 Blackf. (Ind.) 416. "The measure of damages is found by processes analagous to those in actions for trespass." Phillips v. Harris, 3 J. J. Marsh, 123; Warner v. Matthews, 18 Ill. 83. "For any unlawful taking of chattels out of the possession, actual or constructive, of another, the injured party may have trespass *de bonis*, or replevin, at his election." Ely v. Ehle, 3 Comst. (N. Y.) 507. "Ordinarily where replevin will lie trover will lie." Pace v. Pierce, 49 Mo. 393. "Replevin in the *cepit* lies only where trespass might have been brought." Rich v. Baker, 3 Denio, 80. "The same general principles regulate trespass, trover and replevin." Whitfield v. Whitfield, 40 Miss. 367. "Judgment in trespass is a bar to replevin for same goods." Coffin v. Knott, 2 Greene, (Iowa,) 582; Karr v. Barstow, 24 Ill. 580. "Trespass and replevin are concurrent." Gallagher v. Bishop, 15 Wis. 276. "The action is ranked with trespass and trover." Crocker v. Mann, 3 Mo. 473; Walpole v. Smith, 4 Blackf. (Ind.) 304. Same principles apply as in trover. Gerber v. Monie, 56 Barb. 652. The action of detinue, or of replevin, asserts a continuing property in the plaintiff, while trover proceeds on the assumption that by a wrongful conversion the defendant has become the owner, and seeks damages which the conversion has occasioned. McGavock v. Chamberlain, 20 Ill. 220. Replevin is by statute made a substitute for detinue and trover. Wright v. Bennett, 3 Barb. 451. Consult, in this connection, Porter v. Miller, 7 Texas, 473; Seaver v. Dingley, 4 Gr. (Me.) 306; Grace v. Mitchell, 31 Wis. 533; Childs v. Childs, 13 Wis. 17; Sharp v. Wittenhall, 3 Hill, (N. Y.) 576; Brockway v. Burnap, 12 Barb. 351; Rich v. Baker, 3 Denio, 79; Maxham v. Day, 16 Gray, (Mass.) 213; Newman v. Jenne, 47 Me. 520; Mitchell v. Roberts, 50 N. H. 490; Angell v. Keith, 24 Vt. 373; Overfield v. Burlitt, 1 Mo. 749; Gray v. Nations, 1 Ark. 558; Jocelyn v. Barrett, 18 Ind. 128; Burr v. Daugherty, 21 Ark. 559; Heard v. James, 49 Miss. 246; Chinn v. Russell, 2 Blackf. (Ind.) 174; Bethea v. M'Lennon, 1 Ired. (N. C.) 523; Stockwell v. Phelps, 34 N. Y. Ct. Appeals, 363; Wheeler v. McFarland, 10 Wend. 318. Trespass, replevin and trover are concurrent remedies if an owner has the immediate right of possession. Stanley v. Gaylord, 1 Cush. 536. Trespass lies for any unlawful interference with, or dominion over, the goods of another—Hardy v. Clendening, 25 Ark. 440; Ralston v. Black, 15 Iowa, 47; Reynolds v. Shuler, 5 Cow. 325; Hurd v. West, 7 Cow. 753; Gibbs v. Chase, 10 Mass. 125; Phillips v. Hall, 8 Wend. 610; Coffin v. Field, 7 Cush. 355; Phillips v. Harris, 3 J. J. Marsh, (Ky.) 122—and if the trespasser take possession of goods, replevin was always a concurrent remedy. Cummings v. Vorce, 3 Hill, 282; Dunham v. Wyckoff, 3 Wend. 280; Brockway

the defendant.¹ The distinction between trover and replevin consists mainly in the fact that replevin is a possessory action, while trover is based on a right of property, and requires ownership, either general or special, to support it. The right of possession figures in the action of trover only as it forms an incident to the title.² Trespass lies for any unauthorized interference with the goods of another. In trover there must be a conversion.³ In other respects the actions are very similar. Detinue was for the detention, and at common law, supposed a bailment of goods by the plaintiff to the defendant, and a refusal to deliver them after proper request.⁴ In trespass the defendant was liable if he took the goods even for an instant; and an offer to return, accompanied by a tender of the goods, was no defense. In trover the defendant was not liable unless there was an actual conversion. If the defendant surrender the goods on request, he is not liable in trover.

§ 46. *The same.* Replevin was formerly based upon a supposed wrongful taking of the plaintiff's goods. Authorities in recent times have held that it would not lie at common law, except in cases where there has been a wrongful taking.⁵ The whole theory of the action is based upon the assumption that the plaintiff has a general or special property in the goods in dispute, as well as a right to their immediate possession, and that the defendant wrongfully took or wrong-

v. Burnap, 12 Barb. 347; *Marshall v. Davis*, 1 Wend. 110; *Allen v. Crary*, 10 Wend. 349.

¹ 3 Black. Com. 151.

² *Burdick v. McVanner*, 2 Denio, 171; *Heyland v. Badger*, 35 Cal. 404; *Ward v. Macauley*, 4 Term Rep. 260, 488. Compare *Waterman v. Robinson*, 5 Mass. 304. So, in trespass, the plaintiff must aver and prove title. *Carlisle v. Weston*, 1 Met. (Mass.) 26.

³ *Price v. Helyer*, 4 Bing. 597.

⁴ 3 Black. Com. 155; Selw. N. P. 657; Fitz N. B. 323; Y. B. 6 H. 7, 9; *Lawson v. Lay*, 24 Ala. 188; *Schulenberg v. Campbell*, 14 Mo. 491.

⁵ *Pirani v. Barden*, Pike, (5 Ark.) 84; *Wallace v. Brown*, 17 Ark. 452; *Neff v. Thompson*, 8 Barb. 215; *Marshall v. Davis*, 1 Wend. 113; *Woodward v. Railway Co.*, 46 N. H. 525; *Smith v. Huntington*, 3 N. H. 76; *Wheeler v. Cozzens*, 6 How. (Miss.) 280; *Miller v. Sleeper*, 4 Cush. 370; *Ramsdell v. Buswell*, 54 Me. 548; *Chinn v. Russell*, 2 Blackf. 176, note 3; *Vaiden v. Bell*, 3 Randolph, 448; *Watson v. Watson*, 9 Conn. 140; *Drummond v. Hopper*, 4 Harr. (Del.) 327.

fully detained them from him;¹ and upon this assumption the law steps in and restores the property to the original possessor, upon his giving bond to make good his claim to the property.²

§ 47. **Distinction between this action and trespass and trover.** While replevin has a strong resemblance to detinue, trespass and trover, as has been shown in the preceding sections, yet there are certain points of distinction which it is important to observe. One of the principal differences is, that in replevin the property in dispute may be delivered to the plaintiff upon the first process in the case, while in the common law action of detinue, the property is not delivered until after judgment.³ In trespass and trover the property was never delivered to plaintiff. In each of these actions he seeks only to recover the value of his goods, and damages for the injury to or conversion of them. These distinctions, however, only apply to the effect of the remedy; not to the principles which govern in determining the question of right.

§ 48. **The same.** Replevin may frequently be sustained in cases where trespass will not lie. Thus, it is essential, to sustain trespass, that there should be some proof that the defendant has in some way interfered with the plaintiff's goods, or done some act in some way wrongfully interfering with the plaintiff's possession.⁴ Simple omission or refusal to deliver goods rightfully in the defendant's possession would not be an act of trespass, but such refusal might furnish ample grounds to sustain an action of replevin for the detention, or trover for their value.⁵ Again, trespass will not lie against one who comes rightfully into the possession of the goods of another, even though it should turn out that the party who delivered them to him was a wrongdoer.⁶ So, when a bailee of goods

¹ *Hunt v. Chambers*, 1 Zab. (21 N. J.) 624.

² *Mennie v. Blake*, 6 Ell. & B. (88 E. C. L.) 850.

³ *Cox v. Morrow*, 14 Ark. 608; *Badger v. Phinney*, 15 Mass. 362; *Robinson v. Richards* 45 Ala. 358; 3 Black. Com. 152.

⁴ *Grace v. Mitchell*, 31 Wis. 536.

⁵ See *Isaac v. Clark*, 2 Bulst. 310. Sometimes cited as *Thimblethorp's Case*.

⁶ *Barrett v. Warren*, 3 Hill, (N. Y.) 348; *Wilson v. Barker*, 4 Barn. & Adol. (24 E. C. L.) 614.

sells and delivers them without authority, such sale and delivery conveys no title to the purchaser; and though replevin would lie at the suit of the rightful owner, trespass would not lie. If, however, no delivery of the goods accompany such sale, and the purchaser take possession by his own wrong, trespass or replevin for the wrongful taking would lie, at the election of the injured party.¹

§ 49. **The same.** If an infant sell his goods and deliver them with his own hand, though the act be voidable and replevin lies, yet he could not recover in trespass. If, however, the vendee should take them by force, trespass would lie, notwithstanding the sale.² In a case where the action was in the *cepit* for barrels of flour sold by a carrier without authority, and the defendant pleaded *non cepit*, with notice that he should claim: 1st, that the property was his; 2d, that it was the property of the carriers, and 3d, that the carrier had the right of possession. On the trial the defendant proved that he purchased the flour in good faith, for a fair price, from H., the captain of a canal boat, but it was held that under the plea of *non cepit* the title was not put in issue; that proof of purchase from H. was immaterial unless defendant showed that H. was authorized to sell; that there was no proof of delivery, but only of sale by the carrier, the flour being found in the defendant's possession, the action for taking was properly brought, and the plaintiff recovered.³ Again, in replevin the plaintiff is bound to take the goods he sues for when delivered to him by the officer, even though they be in a damaged condition.⁴ But in trespass the plaintiff is not bound to take the goods, but may insist on judgment for value.⁵

§ 50. **The same.** Another important distinction is, that in order to sustain replevin, the defendant must have the actual

¹ Marshall v. Davis, 1 Wend. 109; Nash v. Mosher, 19 Wend. 431; Barrett v. Warren, 3 Hill, 348.

² Fonda v. Van Horn, 15 Wend. 631; Roof v. Stafford, 7 Cow. (N.Y.) 179, and note, citing many cases on the law of infancy.

³ Ely v. Ehle, 3 Comst. (N.Y.) 506.

⁴ Allen v. Fox, 51 N.Y. 564.

⁵ Robinson v. Mansfield, 13 Pick. 144.

or constructive possession of the goods at the time suit is commenced; in other words, he must be in a condition to deliver the property when called on by the officer, in obedience to the command of the writ.¹ Thus, when a creditor in an execution directs the sheriff to levy on certain property, and the sheriff does so and takes possession of it, the sheriff and the creditor in execution may both be liable in trespass; but the sheriff having possession of the property would alone be liable in replevin.²

§ 51. Where one takes forcible possession of his own property, he may be liable in trespass, but not in replevin. Where a person takes forcible possession of his own goods, he may be liable, in certain cases, as a trespasser, but not in replevin; having the right of possession at the time of the seizure, his trespass does not debar him from the right of possession, nor vest the other party with the right to retake the goods.³

¹ *Lathrop v. Cook*, 2 Shep. (14 Me.) 415; *Richardson v. Reed*, 4 Grey, 443; *Hickey v. Hinsdale*, 12 Mich. 100; *Ramsdell v. Buswell*, 54 Me. 546. To this rule some exceptions have been stated, as where the defendant had possession of the goods at one time, but had purposely put them out of his hands to defeat the plaintiff. *Ellis v. Lersner*, 48 Barb. 539; *Brockway v. Burnap*, 16 Barb. 309. See *post*, § 145. While in trespass the defendant may never have had possession. Trover may be sustained where the defendant once possessed the goods, but has disposed of, or has destroyed or made way with them before suit brought. *Richardson v. Reed*, 4 Gray, 442; *Taylor v. Trask*, 7 Cow. 249; *Woolbridge v. Conner*, 49 Me. 353; *McNeeley v. Hutton*, 30 Mo. 332; *Wickliffe v. Sanders*, 6 T. B. Mon. (Ky.) 296; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74.

² *Grace v. Mitchell*, 31 Wis. 533; *Coply v. Rose*, 2 Comst. 115; *Mitchell v. Roberts*, 50 N. H. 486. *Contra*, see *Allen v. Crary*, 10 Wend. 349. The point was made in a case in New York that the plaintiff in execution who had done nothing except to direct the sheriff to levy, had never had possession of the goods, and therefore could not be a defendant in replevin, but the court followed *Allen v. Crary*, 10 Wend. 349, and held that this was a sufficient proof of taking to enable the owner to bring replevin. *Knapp v. Smith*, 27 N. Y. 280.

³ *Taylor v. Welbey*, 36 Wis. 42; *Carroll v. Pathkiller*, 3 Porter (Ala.) 279; *Neely v. Lyon*, (18 Tenn.) 10 Yerg. 473; *Bogard v. Jones*, 9 Humph. (Tenn.) 739; *Hodgden v. Hubbard*, 18 Vt. 504; *Owen v. Boyle*, 22 Me. 67; *Hurd v. West*, 7 Cow. 753; *Spencer v. McGowen*, 13 Wend. 256; *Coverlee v. Warner*, 19 Ohio, 29; *Marsh v. White*, 3 Barb. 518; *Collomb v. Taylor*, 9 Humph. (Tenn.) 689.

§ 52. **Actual detention of the goods necessary to sustain replevin.** While proof of a wrongful or forcible taking from the plaintiff's possession, may be sufficient to sustain trespass, it will not always be sufficient to sustain replevin, without proof of an actual detention of the goods by the defendant at the time the suit was brought. For instance, if the defendant should show that before the suit was brought he returned the goods to the plaintiff, proof of the fact that he had taken them by force would not justify a finding against him in replevin.¹ So, a levy by an officer not authorized by law is a trespass, and an action may be sustained without proof of a removal of the goods.² But replevin would not lie unless the officer should remove the property, or should have the possession of the goods at the time the suit was brought.³

§ 53. **Replevin in cepit, detinet and detinuet.** The action is frequently spoken of as replevin in the *cepit* and in the *detinet*. There was formerly a distinction between these, amounting to more than a form of pleading. The old style of declaration, in case the goods were not delivered on the writ, was * * * "Wherefore, he took, and until now unjustly detains," etc. When the goods were delivered on the writ the form was, "Wherefore, he took and unjustly detained," etc.⁴ Replevin the *cepit* is simply for the wrongful taking, from *capio* in Latin, "to take;" and replevin in the *detinet* is for the detention of goods only, *detinet* being from *de* and *teneo*, "to hold." This distinction, though not of as much importance as formerly, should still be kept in mind.⁵ There is another technical distinction between the action in the *detinet* and in the *detinuet*, the former signifying "he detains," and the latter "he detained." The latter form in the declaration imports that the goods have been delivered to the

¹ Paul v. Luttrell, 1 Colorado, 318. See *post*, § 134, and following.

² Allen v. Crary, 10 Wend. 349; Wheeler v. McFarland, 10 Wend. 322; Neff v. Thompson, 8 Barb. 215.

³ English v. Dalbrow, 1 Miles, (Pa.) 160.

⁴ Harwood v. Smethurst, 5 Dutch. (29 N. J.) 203.

⁵ Pierce v. Van Dyke, 6 Hill, 613; Oleson v. Merrill, 20 Wis. 462; Cummings v. Vorce, 3 Hill, 232.

plaintiff upon his writ; he, therefore, can only recover damages for the taking and detention up to the time of delivery, and not the value of the goods, which by legal intendment are in his possession. When he charges that the defendant *detains*, that is in the *detinet*, and he may have the value as damages.¹

§ 54. **Wrongful taking.** Proof of any unlawful taking or control of the goods of another is sufficient to sustain an allegation of taking, without proof of an actual forcible dispossession of the plaintiff.² Wrongful taking, as used in this connection, does not imply any forcible or malicious act; it simply means that the taking is against right.³ Cases frequently arise, however, where the defendant has become possessed of the plaintiff's goods in a lawful manner, and refuses to deliver them on request. In such cases the action is for the detention, and is called *replevin* in the *detinet*. With this form of action *trover* is always concurrent; or the plaintiff may, at his election, employ it where the goods were taken by force.⁴ As every unlawful taking is *prima facie* an unlawful detention, proof of a wrongful taking is permitted so far as to excuse the plaintiff from the necessity of proof of a demand, even where the form of action is for detaining. The right to prove a wrongful taking in cases where the charge is for detention only will not, however, be permitted to affect the question of damages.⁵

¹ *Petre v. Duke*, Lutw. 360; *Potter v. North*, 1 Saund. 347 *b*, note 2; *Truitt v. Revill*, 4 Harr. (Del.) 71; *Fox v. Prickett*, 5 Vroom, (N. J.) 13. See *Boswell v. Green*, 25 N. J. L. 390.

² *Haythorn v. Rushforth*, 19 N. J. L. 160; *Cox v. Morrow*, 14 Ark. 608; *Stewart v. Wells*, 6 Barb. 80; *Neff v. Thompson*, 8 Barb. 215; *Wheeler v. McFarland*, 10 Wend. 322; *Barrett v. Warren*, 3 Hill (N. Y.) 349; *Murphy v. Tyndall*, Hempst. C. C. 10.

³ *Moore v. Moore*, 4 Mo. 421.

⁴ *Ronge v. Dawson*, 9 Wis. 246; *Cummings v. Vorce*, 3 Hill, (N. Y.) 282.

⁵ *Eldred v. The Oconto Co.*, 33 Wis. 133; *Newell v. Newell*, 34 Miss. 400; *Smith v. McLean*, 24 Iowa, 322. *Replevin* in the *detinet* was seldom used until it was made applicable by statute to a large majority of cases — *Yates v. Fassett*, 5 Denio, 26; *Potter v. North*, 1 Saund. 347 *b* — and it is now the most common form of the action. *Daggett v. Robins*, 2 Blackf. 416.

§ 55. The scope of the investigation in this action. The parties to this action are not confined to an investigation of the naked question of title or right of possession, but may go into all the incidents that go to make up these, as being necessary to arrive at a correct decision. Thus, where replevin was brought to recover property seized under a chattel mortgage, the plaintiff claimed that the note described in the mortgage under which the seizure was made was given for machinery that was warranted; that there was a breach of the warranty, and consequently a failure of consideration to the amount of that note; and the matter was held proper.¹ Where the action was for a distress for rent the defendant was permitted to show that he purchased the premises with the consent of his landlord;² and where the action was for wheat stored with the defendant, and he justified on the ground that he was a warehouseman, the plaintiff replied that some forty bushels were lost or destroyed, and that this equaled in value the storeage.³

§ 56. The same. Where the holder of a prior mortgage replevied from the sheriff, the latter was permitted to set up as a defense under the statute that the mortgage was to secure a loan on usurious interest.⁴ In another case, where the defendant claimed that the property belonged to his minor son, and that he, as natural guardian, was bound to keep the custody of it, the plaintiff offered proof that he bought of the defendant and his son; thereupon the defendant introduced evidence to show that the sale was fraudulent.⁵

§ 57. The same. When the action is for the recovery of goods wrongfully attached by an officer on process against another, the plaintiff must recover on the strength of his own title, which is subject to encounter whatever would tend to show that the property was liable to the levy.⁶

¹ *Hutt v. Bruckman*, 55 Ill. 441; *Bruce v. Westervelt*, 2 E. D. Smith, 440.

² *Hill v. Miller*, 5 S. & R. (Pa.) 355.

³ *Babb v. Talcott*, 47 Mo. 343; *Gillham v. Kerone*, 45 Mo. 490.

⁴ *Dix v. Van Wyck*, 2 Hill, (N. Y.) 522.

⁵ *Bliss v. Badger*, 36 Vt. 338.

⁶ *Hotchkiss v. Ashley*, 44 Vt. 198.

CHAPTER III.

WHEN AND FOR WHAT IT LIES.

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§ 58. **Replevin lies only for chattels.** · Replevin lies only for chattels personal, and not for real estate, or anything attached to or forming part of the realty.¹ The title to land cannot be tried in this action, though, as will be shown here-

¹ *Roberts v. The Dauphin Bank*, 19 Pa. St. 75; *Ricketts v. Dorrel*, 55 Ind. 470; *Vausse v. Russell*, 2 McCord, (S. C.) 329; *Eaton v. Southby*, Willes, 131; *Bower v. Tallman*, 5 Watts & Serg. 556.

after, where the title to chattels depends on the ownership of the soil from which they may have been severed, the title of the land can be investigated, with the view of determining the ownership of chattels.¹ The term "goods" or "chattels," as used in this connection, has the same signification, and includes all species of animate and inanimate movable, tangible property.²

§ 59. **Some illustrations of the rule.** The writ lies for domestic animals, but not for wild animals, until after they are reclaimed;³ or for the increase of domestic animals, and the plaintiff may have judgment in his favor for the young of such animals born, or for wool shorn from them after the animals are replevied.⁴ It lies for money in a box or bag, or so separated from other money that it can be distinguished;⁵ or, bonds which can be identified;⁶ or, the records of a parish or church;⁷ or corporate company;⁸ or, for a note or a check by the legal owner;⁹ but not by the winner of a wager, against the stakeholder, for the winning.¹⁰ It does not lie after the death or destruction of the chattel sued for.¹¹ Neither can it be employed to quiet title to property in the plaintiff's possession.¹²

¹ *Snyder v. Vaux*, 2 Rawle, (Pa.) 427; *Nibblet v. Smith*, 4 Duruf & E. 504; *Gullett v. Lamberton*, 1 Eng. (Ark.) 109; *F. N. B.* 156; *Brown v. Wallis*, 115 Mass. 158; *Bacon v. Davis*, 30 Mich. 157; *Cresson v. Stout*, 17 Johns. 121; *Chatterton v. Saul*, 16 Ill. 150; *Knowlton v. Culver*, 1 Chand. (Wis.) 214; *S. C.*, 2 Pin. (Wis.) 86.

² *Eddy v. Davis*, 35 Vt. 248; *Graff v. Shannon*, 7 Iowa, 508.

³ *Amory v. Flynn*, 10 Johns. 103; *Goff v. Kilts*, 15 Wend. 550; *Buster v. Newkirk*, 20 Johns. 75.

⁴ *Arundel v. Trevil*, 1 Sid. 81; *Buckley v. Buckley*, 12 Nev. 423.

⁵ *Bull, Nisi Prius*, 32; *Skidmore v. Taylor*, 29 Cal. 619; *Dows v. Bignall Lalor Supt.* (Hill & Denio,) 408; *Core's Case*, *Dyer*, 22 b.

⁶ *Sager v. Blain*, 44 Hand, (N. Y.) 448.

⁷ *Baker v. Fales*, 16 Mass. 147; *Sawyer v. Baldwin*, 11 Pick. 492; *Sudbury v. Stearns*, 21 Pick. 148.

⁸ *Southern Plank Road Co. v. Hixon*, 5 Ind. 166.

⁹ *Clapp v. Shepard*, 2 Met. 127; *Graff v. Shannon*, 7 Iowa, 508; *Chickering v. Raymond*, 15 Ill. 363; *Bissell v. Drake*, 19 Johns. 66. But, see *Barnett v. Selling*, 70 N. Y. 492.

¹⁰ *Merchant's S. L. & T. Co. v. Goodrich*, 75 Ill. 554.

¹¹ *Lindsey v. Perry*, 1 Ala. 204; *Scott v. Elliott*, 63 N. C. 215.

¹² *Bacon v. Davis*, 30 Mich. 157; *Hickey v. Hinsdale*, 12 Mich. 100.

Nor will the action lie to remove public papers or documents from a public office. Such instruments are in the custody of the law, and the writ, if issued for their seizure, will be quashed, and the papers returned.¹ Nor for an apprentice, at the suit of his master, the apprentice being a freeman,² though it would always lie for a slave. Nor will it lie for articles in actual use at the time of the service of the writ. Beasts of the plow or tools in actual use could not be distrained. Neither will it lie for articles of clothing or ornament actually worn upon the person, though it be with the design to prevent the service of the writ.³ Neither will it lie by the appointee to an office, for his commission, after it has been made out and duly executed by the appointing power. The judgment is for the thing or its value, and the value of a public office cannot be ascertained or awarded as damages. Replevin, in such cases, is like replevying an office, which the law does not permit.⁴ And without attempting to enter into specific details, the writ may be said to lie for all chattels personal which are *in esse*, and subject to manual delivery, not actually in use or exempted by law.⁵

§ 60. **Chattels severed from realty.** Chattels personal, however ponderous or bulky they may be, and notwithstanding the fact that they may have previously been part of the real estate, may be recovered in this action.⁶ In Arkansas, the statute which made slaves real estate was designed only to change the mode of descent and conveyance, and not to deprive the owner of a right to replevin them in case they were wrongfully taken or detained.⁷

¹ *Brent v. Hagner*, 5 Cranch C. C. 71; *Marbury v. Madison*, 1 Cranch, U. S. 49.

² *Morris v. Cannon*, 1 Harr. (Del.) 220.

³ *Maxham v. Day*, 16 Gray, (Mass.) 213.

⁴ *Marbury v. Madison*, 1 Cranch, U. S. 50.

⁵ *Brown v. Caldwell*, 10 S. & R. (Pa.) 118. The old rule was that it would lie for anything that could be distrained. Bacon Abr., title Replevin.

⁶ *Gear v. Bullendick*, 34 Ill. 74; *Foy v. Reddick*, 31 Ind. 414; *Reese v. Jared*, 15 Ind. 142; *Ombony v. Jones*, 21 Barb. 520; *Dubois v. Kelley*, 10 Barb. 496; *Mills v. Redick*, 1 Neb. 437; *Pennybecker v. McDougall*, 48 Cal. 162; *Huebschman v. McHenry*, 29 Wis. 659.

⁷ *Gullett v. Lamberton*, 1 Eng. (Ark.) 118.

§ 61. **Buildings are prima facie real estate.** Buildings, such as dwelling houses and similar structures, are *prima facie* real estate.¹ They are not fixtures in the common intentment of the law, but part of the land.² So, also, the engine and other machinery of a mill or factory which is attached to or forms part of the permanent structure, is presumptively part of the real estate,³ and as such, not subject to be delivered on this writ; but a building may become personal property with the consent of the owner, or by circumstances which clearly indicate the intention of the owner so to regard it, and it will then be properly the subject of delivery upon the writ of replevin.⁴

§ 62. **Chattels may be attached to, and become part of the realty.** Articles of personal property may be permanently attached to, or become part of a building, and when so attached they are considered part of the real estate, as boards may be wrongfully taken and built into a house or other permanent structure, or machinery may be permanently built into a mill. In such case the owner cannot sustain replevin, but is driven to his action for the value.⁵

§ 63. **What is or is not real estate.** A discussion of what is or what is not real estate, would more properly belong to a treatise on some other subject than replevin, but as it is frequently the most important question to be determined before bringing this action, and as articles which are really chattels sometimes appear to be attached to the realty, and articles which are in fact part of the real estate sometimes appear to be chattels, a brief reference to a few of the author-

¹ Chatterton v. Saul, 16 Ill. 151; Madigan v. McCarthy, 108 Mass. 376; Smith v. Benson, 1 Hill, (N. Y.) 176; Meyers v. Schemp, 67 Ill. 469; Vausse v. Russel, 2 McCord, (S. C.) 329; Davis v. Taylor, 41 Ill. 405.

² Goff v. O'Conner, 16 Ill. 423.

³ Harlan v. Harlan, 15 Pa. St. 513.

⁴ Doty v. Gorham, 5 Pick. 487; Ashmun v. Williams, 8 Pick. 402; Wells v. Banister, 4 Mass. 514; Ricker v. Kelly, 1 Gr. (Me.) 117; Yale v. Seely, 15 Vermont, 221; Fahnestock v. Gilham, 77 Ill. 637; Beers v. St. John, 16 Conn. 322; Dooley v. Crist, 25 Ill. 551; Nalor v. Collinge, 1 Taunt. 19; Mansfield v. Blackburn, 6 Bing. 426.

⁵ Fryatt v. The Sullivan Co., 5 Hill, (N. Y.) 117; Ricketts v. Dorrel, 55 Ind. 470.

ities in which this question and its relation to the action of replevin are considered, may be in place.

§ 64. How far the question as to what is or is not real estate may be investigated in replevin. The action will lie for trade fixtures and other property not part of the realty, and the question as to whether the property in dispute is or is not part of the real estate can generally be investigated and determined in this action. While authorities on this point are not as numerous as might be wished, it is probable that the action would be permitted to investigate the title to property concerning the nature of which an honest, fair question might be made; and for this purpose the sheriff would be warranted, in obedience to the mandate of the writ, in severing and removing property which might appear to be a part of the real estate; but in so doing the sheriff should exercise a reasonable discretion, and if his right to sever the property be denied on the ground that it is in fact real estate, he ought to permit the defendant all the opportunity to restrain the proceeding which he can consistently with his duty, and ought not to execute the writ by making such severance unless it appears the party is acting in good faith, on reasonably probable grounds, and not then in an oppressive manner, or without ample security.

§ 65. The same. *Hamilton v. Stewart*, 59 Ill. 331, was an injunction to restrain a party from entering and removing from a basement room, certain fixtures which had been placed there for the convenience of parties occupying it as a saloon. The property consisted of a counter, ice box, shelves and gas fixtures. The court said that the party would have the undoubted right to employ replevin; and on the trial the nature of the fixtures could be investigated, whether they were permanently attached to the building and formed part of the realty, or whether they were mere temporary articles placed there for the convenience of the trade carried on in the building, and which could properly be removed by a tenant, or a purchaser from him; thus recognizing the right of a party to have the question as to whether the articles were part of the real estate determined in the replevin suit.

§ 66. The same. When the property was 'a frame dwell-

ing, it was said that the action should not be dismissed until the court could first determine from the evidence whether it was real or personal property.¹ So it was no cause of demurrer to a declaration in replevin that it was brought for a barn, shingle mill and office. These things might be real estate; yet they might be personal property; and whether they are or not is a matter of evidence upon which the court must determine as the facts shall appear after a full consideration of the evidence.²

§ 67. *The same. Trade fixtures.* Ewell on Fixtures (p. 91) states the law to be well settled "that mere utensils or machines, or other articles of a similar nature, being themselves of a chattel nature, and capable of being detached without material injury to the freehold or themselves, and of being set up and used elsewhere, are removable by the tenant or his vendee during his term." All such articles would therefore be the proper subjects of a suit in replevin, and the officer having such a writ, properly describing them, would without question be authorized to sever and remove them. "On the other hand," continues the same authority (p. 93), "there may be annexations made by a tenant occupying premises for trade purposes of so intimate and permanent a character as to furnish satisfactory evidence that the annexations were intended to be permanent accessions to the realty." In such cases the action of replevin would of course fail; but this statement of the general rule leaves a wide field open to dispute as to whether, in any particular case, the property in question should be placed with the former or the latter class. Upon this question it can only be said that each case must necessarily present a mixed question, consisting mostly of fact, to which the general rules of the law must be applied.³

¹ *Elliott v. Black*, 45 Mo. 373.

² *Brearly v. Cox*, 4 Zab. (24 N. J.) 287. Consult, also, *Guthrie v. Jones*, 108 Mass. 193; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Fahnestock v. Gilham*, 77 Ill. 637; *Goodrich v. Jones*, 2 Hill, 142; *Reynolds v. Shuler*, 5 Cow. 323.

³ Consult *Brown v. Wallis*, 115 Mass. 158; *Guthrie v. Jones*, 108 Mass. 191; *Cresson v. Stout*, 17 Johns. 116; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Bliss v. Whitney*, 9 Allen, 114; *Cong. Society of Dubuque v. Fleming*, 11 Iowa, 533.

§ 68. Buildings while fixed are part of the realty; while being moved are personalty. In Illinois when a house was built on a foundation in such a manner as showed that it was intended for a permanent residence, and not for a temporary purpose, it was held part of the realty, and in such case if the house had been removed to another lot, and there again fixed upon a permanent foundation, such as would show it was intended to be permanent, though it might be regarded as personal property while in transit, yet when so fixed upon the second lot it would again become realty, and not subject to replevin.¹

§ 69. Fixtures, or other articles severed from the realty, become personalty. Fixtures severed from the realty become personal property, and are subject to recovery in this action as though never attached to the soil.² Thus it lies for machinery of a mill severed from the real estate,³ or trees cut down;⁴ or property which would otherwise be treated as real estate may, by the act of the parties, be regarded and treated as personal, even without actual severance, and so become the subject of recovery in this action.⁵ Grass cut from the freehold is personal, and in an action for it the plaintiff need not show title to the land.⁶

§ 70. The same. Where a person purchased a mill at sheriff's sale, and the *real estate only* was sold, another party claimed the machinery and severed and took it, with the knowledge of the purchaser at the sheriff's sale, who afterward brought replevin, claiming it as part of the real estate. The purchaser was permitted to show that it was in fact part of the realty, and was sold by the sheriff with the realty and conveyed to him, and upon making such proof he could sustain

¹ *Salter v. Sample*, 71 Ill. 431.

² *Brown v. Caldwell*, 10 S. & R. 118; *Heaton v. Findlay*, 12 Pa. St. 304; *Mather v. Ministers of Trinity Church*, 3 S. & R. 509. Compare *Voorhis v. Freeman*, 2 Watts & Serg. 116; *Pyle v. Pennock*, Ib. 290; *Baker v. Howell*, 6 S. & R. 476.

³ *Cresson v. Stout*, 17 Johns. 116; *Harlan v. Harlan*, 15 Pa. St. 514.

⁴ *Richardson v. York*, 2 Shep. (Me.) 216; *Bower v. Higbee*, 9 Mo. 200.

⁵ *Shell v. Haywood*, 16 Pa. St. 527; *Piper v. Martin*, 8 Barr. (Pa.) 211.

⁶ *Johnson v. Barber*, 5 Gilman, (Ill.) 426.

replevin against the party who wrongfully severed it.¹ When one built a mill on the land of another, under an agreement that it was to be the property of the builder until a certain judgment should be paid, the judgment was not paid but the land, with the mill standing thereon, was sold on execution, the mill was held to be the personal property of the builder.²

§ 71. **The same.** Two persons leased land for a salt well on shares. Petroleum came up with the salt water and they collected and sold it, and the owner of the land brought trover. The court held that the salt only was granted, and that everything else was reserved, but that as the lessees could not run the salt water without the petroleum, that the severance of the oil from the real estate was inevitable and lawful, and that this possession by the defendants was lawful; that trover would not lie; that the proper remedy was in equity.³ This case conforms in principle so far as the question of severance is concerned, to the current of authorities, but no good reason is perceived why, if the owner of the land was entitled to the oil, he could not, after demand, recover it in replevin.

§ 72. **The same.** A party bought a lot, paying only a small part of the purchase money, and built a house on it. After a number of installments of the purchase money were due and unpaid, he moved the house off. Thereupon the owner of the ground demanded it as personal property, and replevied it. It was held that the action was proper and could be sustained, so long as the house was not permanently attached to other realty.⁴

§ 73. **The severance of chattels does not change the title.** It is an unquestioned rule of the common law that standing trees belong to the realty, and as such they are not subject to replevin; but trees cut down by a tenant become personal property, and if the tenant had no right to cut them they belong to the owner of the land, and he can sustain replevin

¹ *Harlan v. Harlan*, 15 Pa. St. 513. See, also, *Heaton v. Findlay*, 12 Pa. St. 304.

² *Yater v. Mullen*, 24 Ind. 277.

³ *Kier v. Peterson*, 41 Pa. St. 358.

⁴ *Ogden v. Stock*, 34 Ill. 522. See, also, *Salter v. Sample*, 71 Ill. 432.

for them.¹ Timber cut on State lands belongs to the State, and may be followed as long as it can be identified.² When plaintiff bought land at sheriff's sale, and took deeds, and also took possession, with permission to defendants to remain in two houses on the land as tenants at sufferance, and while there they cut hay on the land, the purchaser was allowed to recover in replevin.³ The reason for this rule is, that a severance of property from the realty does not change the ownership. It belongs to the owner of the land as much after the severance as before, and he is entitled to all the remedies for its recovery which the law allows for any personal property wrongfully taken or detained from its owner.⁴

§ 74. **The same. Growing crops.** Crops growing on land pass with the title to the realty. So, when a tenant rents land from one against whom suit in ejectment is pending, of which the tenant has notice, and the suit is determined against his landlord, the growing crops pass with the soil, and the party recovering in ejectment may recover them in replevin, if the tenant harvests them and refuses to deliver.⁵ Upon a sale of the land, and reservation in the deed of plants or crops growing thereon, they become personal property, and replevin will lie for their recovery.⁶ So where crops of wheat or corn are wrongfully severed by a trespasser, the owner is not thereby divested of his property, but may sustain replevin.⁷

§ 75. **Actual severance not necessary to give property the character of personalty.** An actual severance or disconnection of property from the real estate is not essential to give it

¹ *Paget's Case*, 5 Co. Rep. 76 b; *Richardson v. York*, 2 Shep. (14 Me.) 216; *Bower v. Higbee*, 9 Mo. 260; *Gillerson v. Mansur*, 45 Me. 26; *Snyder v. Vaux*, 2 Rawle, (Pa.) 427.

² *Schulenberg v. Harriman*, 21 Wall. 44.

³ *Nichols v. Dewey*, 4 Allen, (Mass.) 386.

⁴ *Halleck v. Mixer*, 16 Cal. 578.

⁵ *Rowell v. Klein*, 44 Ind. 290, citing many cases. Manure made on the farm is part of the realty, but not manure made at a livery stable. *Daniels v. Pond*, 21 Pick. 370; *Middlebrook v. Corwin*, 15 Wend. 169.

⁶ *Ring v. Billings*, 51 Ill. 475; *Gibbons v. Dillingham*, 5 Eng. (Ark.) 9.

⁷ *Bull v. Griswold*, 19 Ill. 632; *Anderson v. Hapler*, 34 Ill. 439; *Langdon v. Paul*, 22 Vt. 205; *Sands v. Pfeiffer*, 10 Cal. 258; *Sanders v. Reed*, 12 N. H. 558.

the character of personal property. Simple consent or agreement of the owner of the real estate will usually be sufficient, and such consent may be inferred from his acts or from his dealings, when they clearly indicate such intentions. Thus, the sale of an engine and boiler separate from the land, accompanied by possession and acts of ownership by the vendee, amounts to a severance of the property from the real estate.¹

§ 76. **The same.** A building or other fixture, which is ordinarily a part of the real estate, when placed on the land of another, with his consent, with the intention of removal, is regarded as personal property, and may be the subject of replevin.² In California, a building which was placed on blocks not in any way attached to the soil, was regarded as personal property.³ A fence was built on the land of another by mistake, and remained there for fifteen years with the consent of the owner of the land; he then requested the plaintiff to remove it, and shortly after took it away himself. The owner of the fence brought, and was permitted to sustain replevin.⁴

§ 77. **Chattels fixed to the land of another without his consent.** Where the owner of chattel property fixes it to the real estate of another without his consent, it becomes real estate, and cannot be the subject of an action of replevin. So, if one acquire possession of his neighbor's chattels, and fix them to his own land, so that they form part of the real estate, though trespass or trover might lie, replevin would not furnish a remedy.⁵ A building placed on the land of another by mistake, without the owner's knowledge or consent, would be personal property, and liable for the debts of the builder—the owner of the land not objecting.⁶

§ 78. **Same. Entry under adverse claim.** Where one en-

¹ *Hensley v. Brodie*, 16 Ark. 511.

² *Weathersby v. Sleeper*, 42 Miss. 732; *Hines v. Ament*, 43 Mo. 300; *Ashmun v. Williams*, 8 Pick. 402; *Russell v. Richards*, 10 Me. 429; *Foy v. Reddick*, 31 Ind. 414.

³ *Pennybecker v. McDougal*, 48 Cal. 162. See, also, *Mills v. Redick*, 1 Neb. 437. But, see *Huebschman v. McHenry*, 29 Wis. 653.

⁴ *Hines v. Ament*, 43 Mo. 300.

⁵ *Fryatt v. The Sullivan Co.*, 5 Hill. (N. Y.) 117.

⁶ *Fuller v. Tabor*, 39 Me. 520.

ters on the land of another under an adverse claim, and erects a house, and after ejectment removes the house, the owner of the land can recover it in replevin; and the fact that it was a wooden building, and that the builder erected it intending to remove it at some future day, will make no difference;¹ but in such case, if the building had been removed before the suit in ejectment was determined, it might have presented another case.²

§ 79. **The title to real estate — when evidence in replevin.** While, as has been shown, replevin does not lie for real estate, and the title thereto cannot be directly tried in this action,³ yet this rule only applies so far as the suit is for the purpose of investigating the title to real estate. When the title only comes in question as a means of determining the ownership of chattels, there is no reason why the courts having the proper jurisdiction may not resort to an inquiry into the title of real estate, as determining the ownership of chattels which have been severed therefrom; for in such case it is not a trial of the title to lands, but of chattels.⁴

§ 80. **The same.** The current of authorities fully sustains this doctrine. The title to land must sometimes be inquired into, as the only means of determining the ownership of chattels which have been severed therefrom, and in such case deeds and title papers may be read in evidence, in replevin. As a general rule governing such cases, it may be stated that the title to real estate may be incidentally called in question in this action, not for the purpose of determining disputed titles to real property, but to enable the court to pronounce intelligently on the title to chattels, where other evidence leaves a doubt.

§ 81. **Holder of colorable title cannot recover chattels severed.** In a suit for logs cut on land, the title to which was claimed by plaintiff, and of which the plaintiff was in actual possession, the action might be sustained without proof of title; but in such case the defendant could show an adverse title

¹ Huebschmann v. McHenry, 29 Wis. 659.

² See § 85 and note, and § 88 and note.

³ See *ante*, § 58.

⁴ Clement v. Wright, 40 Pa. St. 251.

to the land of a higher character than the plaintiff's and defeat the action. The holder of colorable title, without other right, though in possession, cannot recover against the real owner by a resort to replevin, any more than in any other action;¹ but the holder of colorable title in good faith would doubtless be permitted to defend in this action.² Where the plaintiff cleared land and put in wheat, and was in possession when the defendant entered and cut it, the defendant offered to prove that the land was his, and that the plaintiff was a trespasser, in sowing the grain, and the court admitted the evidence.³

§ 82. **The same. Defendant holding under claim of title in good faith.** But when the defendant is in possession of the land, holding adversely under color of title in good faith, the plaintiff, even though he be the real owner of the soil, cannot recover chattels severed therefrom. Replevin cannot be the means of litigating and determining the title to real estate between adverse claimants.⁴ The owner of land may bring replevin for chattels severed from the freehold, where there is no adverse possession, or where the adverse possessor is a trespasser; but the law does not permit adverse claimants to contest the title to land under pretense of a contest about chattels, as this would perhaps sometimes give a decided advantage to the plaintiff;⁵ and the general rule may be stated that neither replevin nor trover lies against a party in the actual possession of land holding title, for timber, slate, or any other thing severed therefrom, even in case the title is in dispute, but it does lie by the owner in possession either actually

¹ *Hungerford v. Redford*, 29 Wis. 347. See, also, *Schulenberg v. Campbell*, 14 Mo. 493; *Harlan v. Harlan*, 15 Pa. St. 513; *Hart v. Vinsant*, 6 Heisk. (Tenn.) 616.

² See *post*, § 82.

³ *Elliott v. Powell*, 10 Watts, (Pa.) 454.

⁴ *Snyder v. Vaux*, 2 Rawle, (Pa.) 437; *Halleck v. Mixer*, 16 Cal. 575; *Harlan v. Harlan*, 15 Pa. St. 513; *De Mott v. Hagerman*, 8 Cow. 219.

⁵ *Vausse v. Russel*, 2 McCord, 329; *Mather v. Trinity Church*, 3 S. & R. 509; *Baker v. Howell*, 6 S. & R. 476; *Brown v. Caldwell*, 10 S. & R. 114; *Powell v. Smith*, 2 Watts, 126; *De Mott v. Hagerman*, 8 Cow. 220; *Davis v. Easley*, 13 Ill. 192; *Saunders v. Reed*, 12 N. H. 558; *Langdon v. Paul*, 22 Vt. 205; *Sands v. Pfeiffer*, 10 Cal. 258; *Anderson v. Hapler*, 34 Ill. 436; *Cresson v. Stout*, 17 John. 116.

or constructively, as against one who wrongfully severs and removes any part of the realty without color of right.¹

§ 83. **The same.** The action cannot be used to litigate title to land. This rule, though clearly defined and well established, requires some care in its application. When the plaintiff bases his right to recover a chattel which has been severed from realty, on the fact that he owns and is entitled to immediate possession of the land from which the chattel was severed, he may give evidence of his title to the land, and that will establish his title to the chattel, and a mere intruder or trespasser on the land cannot object so as to defeat the action; but when the defendant in such cases is in possession, and claims a title adverse to the plaintiff, and has color of title in good faith, the plaintiff cannot recover against him in replevin.²

§ 84. **The same.** Chattels severed through mistake in boundaries. When O. built a cabin and stable, and cut timber on land, the boundaries of which were not exactly known, and some of the timber cut was on the land of another, it was held that the possession of the land where the timber was cut was not such as could be used as a defense in a suit in replevin. Nothing short of an actual adverse possession, under claim of ownership, will deprive the owner of the right to sue in this action for chattels severed from his land;³ and the rule that a party in possession under paper title is restricted in his possession by the calls in his deed (unless he has actual possession of other lands), applies in replevin as in other actions.

§ 85. **The same.** Chattels severed by a trespasser. Plaintiff was in possession of about eight hundred acres of land,

¹ *Brewer v. Fleming*, 51 Pa. St. 111; *Wright v. Guier*, 9 Watts, 172; *Elliott v. Powell*, 10 Watts, 454; *Harlan v. Harlan*, 3 Harris, (15 Pa. St.) 509; *Brown v. Caldwell*, 10 S. & R. (Pa.) 114. Where a disseizor enters and sows wheat, and the real owner afterward re-enters, he shall have the crop, whether cut and on the premises or growing, because he takes his former title, and the crops belong to him, and the disseizor can take nothing. *Hooser v. Hays*, 10 B. Mon. (Ky.) 72.

² *Halleck v. Mixer*, 16 Cal. 579; *Page v. Fowler*, 28 Cal. 608; *Harlan v. Harlan*, 15 Pa. St. 513; *Anderson v. Hapler*, 34 Ill. 439.

³ *Young v. Herdic*, 55 Pa. St. 172.

which had been inclosed for several years, but the fences had fallen down in places. Defendants entered and claimed to pre-empt, each one-quarter section. They built houses and lived on the claims. They were not successful in establishing their claim for pre-emption, and plaintiff recovered against them in ejectment. While they were in possession, they cut hay, which the plaintiff replevied. *Held*, that the replevin suit could not be sustained; that the owner of the land was out of the possession, and defendants in possession, claiming to own it. The owner of land, being *ousted*, may have his action for the rents and profits, but not for the crops grown on the land and harvested and removed by the disseizor. The law in all such cases gives the owner an action for the rents and profits, but not the crops, or their value. It would be oppressive to require one, after years of litigation, after finding he had a bad title, to pay the value of the crops grown; and it would be an inconvenience to the public if they were obliged to look at his title before buying his crops.¹

§ 86. **The same.** When replevin was brought for wood cut on plaintiff's land by defendant, who was in possession as a trespasser without color of title, adverse possession of the land, unless for a period long enough for the statute of limitation to run, would not protect the defendant in an action for the timber severed from the realty; the court saying that when the defendant is in possession as a trespasser, his rights resting only on a naked assertion of title sufficient to put the statute of limitations in operation, the question of title cannot be said to be in issue until the statute has actually run.²

§ 87. **The same.** When a trespasser entered on land and sowed grain, and the land was afterward sold by the sheriff upon execution against the owner, the purchaser at such sale was entitled to the grain; and when the purchaser, by mistake, took the trespasser for a tenant of the former owner, and seized upon the grain by distress for rent, and it was replevied by the trespasser, who pleaded *non tenuit* to the avowry in replevin, the defendant in replevin (the purchaser)

¹ Page v. Fowler, 39 Cal. 415; Page v. Fowler, 28 Cal. 608

² Kimball v. Lohmas, 31 Cal. 155.

was entitled to take him at his word, and if not a tenant he was a trespasser, and the defendant in replevin was entitled to recover.¹ The doctrine stated has been carried even further in California, where it was said the owner of the land cannot sustain replevin for crops raised on the land by one who holds possession with adverse claim of right, even though *without color of title*.²

§ 88. Where a party in possession of lands claiming to own them severs chattels. Land was in the actual possession of W., claiming the premises as his own, and holding adversely to plaintiff, who had the title; while so in possession he cut a quantity of hay and sold it to defendant, and plaintiff brought replevin. *Held*, it could not be sustained, W. being in possession and claiming title must be regarded as the owner until after judicial decree.³

§ 89. Summary. From these cases it would seem, then, that the mere assertion of title by one in possession will not defeat the rights of the real owner of the fee. The law will not permit a mere trespasser to set up a claim of title and thus acquire rights, or protect himself in his wrong-doing. The title which will protect one in possession must be a colorable title, made in good faith. It is not adverse possession alone, nor adverse possession claiming title, unless for a sufficient length of time for the statute of limitations to run that constitutes the grounds of defense, but a colorable title made in good faith. The assertion of title by a trespasser confers no title.⁴

¹ *Hellings v. Wright*, 14 Pa. St. 375.

² *Pennybecker v. McDougal*, 46 Cal. 662.

³ *Stockwell v. Phelps*, 34 N. Y. 363. See *Mather v. Ministers, etc.*, Trinity Church, 3 S. & R. 509; *Lehman v. Kellerman*, 65 Pa. St. 489; *Ralston v. Hughes*, 13 Ill. 469.

⁴ *Halleck v. Mixer*, 16 Cal. 574; *Page v. Fowler*, 39 Cal. 412; *Kimball v. Lohmas*, 31 Cal. 158; *Stockwell v. Phelps*, 34 N. Y. 363; *Brown v. Caldwell*, 10 S. & R. 118. An execution debtor has no right to keep purchaser at sheriff's sale out of possession by sowing crops (wheat) which may not mature until after the purchaser is entitled to his deed. The debtor, after such sale, cannot maintain replevin for such crops as sown by himself. *Parker v. Storts*, 15 O. St. 352. It was said if the owner of a mill take out

§ 90. How far a mortgage on real estate passes title to chattels severed therefrom. The question as to how far a mortgage passes the title to land so as to convey chattels severed from the realty to the mortgagee is often of the greatest importance, and sometimes attended with considerable difficulty. Upon this question authorities are not uniform. The general rule may be stated, that in States where the mortgage is by law regarded as an absolute conveyance of the land with a condition of defeasance on payment of the mortgage debt, that chattels severed from the realty during the existence of the mortgage may be said to belong to the mortgagee, and he may recover them in an action of replevin. But when the mortgage is only regarded as a security for debt, and not a conveyance of the title to the land chattels severed from the land, do not necessarily belong to the mortgagee, at least not until after default and foreclosure. In many of the States a mortgage is considered a conveyance of the fee, and in such case a fixture severed without the consent of the holder of the mortgage so as to endanger the security may be recovered in replevin, as he is looked upon as the owner of the fee.¹

§ 91. The same. In Minnesota it was held that the holder of a mortgage on real estate is not entitled to the timber cut from the mortgaged property, even after default, until he shall have foreclosed his mortgage. The reason for this decision seems to be based on the statute which substantially declares that a mortgage shall not be held a conveyance so as to entitle the holder to recover possession without foreclosure.² But in Rhode Island it was held that the mortgagee could sustain

a mill stone to pick it, and devise the mill while it is out, the mill stone shall pass by the devise. Bull, N. P. 34.

¹ *Smith v. Goodwin*, 2 Me. 173; *Hemenway v. Bassett*, 13 Grey, 378; *Gore v. Jenness*, 19 Me. 53; *Roberts v. Dauphin Bank*, 19 Pa. St. 75; *Cope v. Romeyne*, 4 McLean, 384; *Latham v. Blakely*, 70 N. C. 368; *Gray v. Holdship*, 17 S. & R. 413; *Goff v. O'Conner*, 16 Ill. 421; *Sanders v. Reed*, 12 N. H. 561; *Frothingham v. McKusick*, 24 Me. 405; *Bussey v. Page*, 14 Me. 132; *Smith v. Moore*, 11 N. H. 55; *Thomas v. Crofut*, 14 N. Y. 474; *Van Pelt v. McGraw*, 4 N. Y. 111; *Fernald v. Linscott*, 6 Me. 234; *Bratton v. Clawson*, 2 Strobb. (S. C.) 478.

² *Adams v. Corriston*, 7 Minn. 456.

replevin against the mortgageor¹ in possession for timber cut on the mortgaged premises in substantial diminution of the security of the mortgage.² Substantially the same rule was declared to be the law in Maine and New York, where the court permitted the mortgagee before entry to recover in trespass for cutting timber in the mortgaged premises; the reason being that it might diminish the security.³

§ 92. *The same.* In Vermont the mortgagee, after condition broken and before foreclosure, was allowed to sustain trover against the mortgageor for the value of timber cut, and replevin would of course have been permitted had that been the form of the action.⁴ But in Kansas the mortgageor removed a house from the mortgaged premises and the remedy was denied.⁵

§ 93. *The same.* "The question," said REDFIELD, J., "in *Langdon v. Paul*, 22 Vt. 210, is whether the mortgagee, after condition broken, can maintain an action in the nature of waste against the mortgageor in possession for cutting timber and selling it, or trover for the timber." There is no English case against the action. In the case of *Hitchman v. Walton*, 4 Mees. & W., 409, the court of exchequer upon a full argument decided the action maintainable on either count. The mortgageor, said the court, has no just grounds of complaint. He may at any time defeat the plaintiff's action by paying the mortgage debt and tending the costs. If he will not do that,

¹ It is with feelings of extreme diffidence that the author has ventured to depart from the examples of many eminent law writers in the orthography of this word. He has, however, followed the legal pronunciation and the spelling of the dictionaries, all of which it is believed will be found to agree therewith.

² *Waterman and Wf. v. Matteson*, 1 Ames, (4 R. I.) 540.

³ *Stowell v. Pike*, 2 Greenleaf, (Me.) 387; *Fernald v. Linscott*, 6 Greenleaf, (Me.) 238; *Gore v. Jenness*, 19 Me. (1 App.) 54; *Smith v. Goodwin*, 2 Me. 173. See, also, *Northampton Paper Mill v. Ames*, 8 Met. 1; *Yates v. Joyce*, 11 Johns. 136; *Jackson v. Bronson*, 19 Johns. 326; *Hatch v. Dwight*, 17 Mass. 299; *Van Pelt v. McGraw*, 4 Comst. (N. Y.) 110; *Gardner v. Heartt*, 3 Denio, 233.

⁴ *Langdon v. Paul*, 22 Vt. 210. See, also, *Lull v. Matthews*, 19 Vt. 322; *Morey v. McGuire*, 4 Vt. 327.

⁵ *Clark v. Reyburn*, 1 Kan. 281.

but suffer the estate to go upon the mortgage, the mortgagee is entitled to his judgment.¹

¹ *Morey v. McGuire*, 4 Vt. 327; *Lull v. Matthews*, 19 Vt. 322. See, also, *Blaney v. Bearce*, 2 Me. 132; *Frothingham v. McKusick*, 11 Shep. (24 Me.) 403; *Gore v. Jenness*, 19 Me. 53.

CHAPTER IV.

PLAINTIFF MUST HAVE THE RIGHT TO IMMEDIATE AND EXCLUSIVE POSSESSION.

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§ 94. **Plaintiff must have a right to immediate and exclusive possession.** One of the cardinal rules in this action is, that the plaintiff must in all cases have a general or special property in the goods which he seeks to recover, with the right to their immediate and exclusive possession at the time of the commencement of his suit. This has been the rule from the earliest times, and is sustained by an unbroken current of authorities to the present day.¹ It is also an established rule that the plaintiff, having such property and right of possession, may sustain the action without other title, even against the general owner.² In Iowa it is said the simple question to be determined is, "in whom was the right of possession at the time of the institution of the suit." And in this view it is sufficient for the plaintiff to allege his right of possession when his suit was begun.³ So, where the action was for the

¹ Britton, Nichol's Trans., Vol. 1, p. 139; *Gordon v. Harper*, 7 Durnf. & East. 9 and 6; *Smith v. Plomer*, 15 East, 607; *Jimmerson v. Green*, 7 Nebraska, 26; *Meredith v. Knott*, 34 Geo. 222; *Crocker v. Mann*, 3 Mo. 473; *Russell v. Minor*, 22 Wend. 659; *McIsaacs v. Hobbs*, 8 Dana, (Ky.) 268; *Hubloun's Case*, Skinner, 65; *Reese v. Harris*, 27 Ala. 306; *Loveday v. Mitchell*, Comyns, 247; *Hilger v. Edwards*, 5 Nev. 84; *Muggridge v. Eveleth*, 9 Met. 235; *Kirby v. Miller*, 4 Cold. (Tenn.) 3; *Sager v. Blain*, 5 Hand. (N. Y.) 449; *Bassett v. Armstrong*, 6 Mich. 397; *Barrett v. Scrimshaw*, Combe, 477; *Lloyd v. Goodwin*, 12 S. & M. (Miss.) 223; *Packard v. Getman*, 4 Wend. 613; *Waterman v. Robinson*, 5 Mass. 304; *Hallinbake v. Fish*, 8 Wend. 547; *Fairbank v. Phelps*, 22 Pick. 538; *Forth v. Pursley*, 82 Ill. 152; *Ingersoll v. Emerson*, 1 Carter, (Ind.) 77; *Bradley v. Michael*, 1 Carter, (Ind.) 552; *Johnson v. Neale*, 6 Allen, 228; *Barry v. O'Brien*, 103 Mass. 521; *Pattison v. Adams*, 7 Hill, (N. Y.) 126; *Wade v. Mason*, 12 Gray, 335.

² *Crocker v. Mann*, 3 Mo. 473; *Prater v. Frazier*, 6 Eng. (Ark.) 249.

³ *Cassell v. Western Stage Co.*, 12 Iowa, 48. But, see, and compare *Pattison v. Adams*, 7 Hill, (N. Y.) 126. "The plaintiff must have a general or special property in the goods, with the right to immediate possession." *Lowry v. Hall*, 2 W. & S. (Pa.) 133; *Stapleford v. White*, 1 Houst. (Del.) 238; *Lester v. McDowell*, 18 Pa. St. 91; *Pierce v. Stevens*, 30 Me. 184; *Haythorn v. Rushforth*, 4 Har. (19 N. J.) 160; *Seibert v. M'Henry*, 6 Watts. (Pa.) 302. "The action cannot be sustained by one who has not at the time a general or special property in the goods, with the right to their immediate possession." *Miller v. Adsit*, 16 Wend. 335; *Perley v. Foster*, 9 Mass. 114; *Thompson v. Button*, 14 Johns. 84; *Dunham v. Wyckoff*, 3 Wend. 281; *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32. "The plaintiff must have the exclusive right to the possession of the goods at the time the suit is begun." *Hunt v. Chambers*, 1 Zab. (21 N. J.) 623; *Kingsbury v. Buchanan*, 11 Iowa,

grain in a warehouse, the defendants were permitted to show that there was grain in the warehouse belonging to other parties, as a defense.¹ Therefore, when the plaintiff's right to possession did not accrue until after his suit was begun, he had not at that time the right to possession, and could not sustain the action.²

§ 95. **Proof of wrongful taking not necessary.** An actual wrongful or forcible taking from the plaintiff's possession was formerly essential;³ but as the law stands now, such proof is not requisite.⁴

§ 96. **The term "property," or "property in the plaintiff," does not mean absolute ownership.** The term "property," or "property in the plaintiff," used in this connection, and generally in this action, does not mean ownership by absolute title, but a right to the possession or dominion over the goods, which he seeks to recover, at the time he makes demand or brings suit.⁵ So, in case of the defendants, a plea of property

387; *Noble v. Epperly*, 6 Port. (Ind.) 416; *Barrett v. Turner*, 2 Neb. 174; *Dickson v. Mathers*, Hempst. U. S. C. C. 65. Possession for the full period of the Statute of Limitations invests the party with title. He may make use of it against the former owner, if he assume to retake the property. *Hicks v. Fluit*, 21 Ark. 463. "Persons having a special property in the goods, with the right to immediate possession, may sustain the action." *Wheeler v. McFarland*, 10 Wend. 324; *Branch v. Wiseman*, 51 Ind. 1; *Tut-hill v. Wheeler*, 6 Barb. 363; *Mead v. Kilday*, 2 Watts. 110; *Hamilton v. Mitchell*, 6 Blackf. 131; *Burton v. Tannehill*, 6 Blackf. 470. The plaintiff must have a right to delivery of the goods at the time the writ issues. *Sharp v. Whittenhall*, 3 Hill, 576.

¹ *Nelson v. McIntyre*, 1 Bradwell, (Ill.) 603. See, also, *Gillett v. Treganza*, 6 Wis. 343. Consult *Rose v. Tolly*, 15 Wis. 444; *Walpole v. Smith*, 4 Blackf. 306; *Presley v. Powers*, 82 Ill. 125; *Chinn v. Russell*, 2 Blackf. 174; *Clark v. Heck*, 17 Ind. (Harrison,) 281; *Wheeler v. Train*, 3 Pick. 255; *Beckwith v. Philleo*, 15 Wis. 223; *Appleton v. Barrett*, 22 Wis. 569; *Rogers v. Arnold*, 12 Wend. 30.

² *Campbell v. Williams*, 39 Iowa, 646.

³ *Ely v. Ehle*, 3 Comst. (N. Y.) 506; *Dame v. Dame*, 43 N. H. 37; *Wright v. Armstrong*, Breese, (Ill.) 130; *Harwood v. Smethurst*, 29 N. J. L. 195.

⁴ *Kerley v. Hume*, and *Hume v. Gillespie*, 3 T. B. Mon. (Ky.) 181. Compare *Cobb v. Megrath*, 36 Geo. 625; *McArthur v. Hogan*, Hempst. 286; *Skinner v. Stouse*, 4 Mo. 93. See cases cited in notes to § 94.

⁵ *Johnson v. Carnley*, 6 Selden, (N. Y.) 570; *Sprague v. Clark*, 41 Vt. 6.

in defendant does not mean absolute ownership, but a right to present and exclusive possession.¹

§ 97. **Right of possession and ownership may be in different persons.** The right to the immediate possession may, sometimes, be in one person, while the title may be in another,² as frequently arises in cases of bailment for a special purpose. The bailee may have the right to the immediate possession by virtue of a lien for services bestowed, or a lease for an unexpired time, and in such case the action can be sustained by the owner of the special property even against the owner of the title, upon showing right to possession as against him at the time the suit was begun;³ and the plaintiff's claim is sufficiently maintained if he shows himself entitled to possession as against the defendant at the time the suit was begun. He is not obliged to show title against the world.⁴ The statutes giving the right to maintain replevin, which are substantially the same in all the States, do not limit the action to the owner of absolute title, but any owner of special property with the right to possession is entitled to sustain the action the same as though he held absolute title.⁵

§ 98. **Property of bailee.** As a general rule, property in the hands of a borrower, trustee or bailee, for a limited time or purpose, without fraud or wrongful intent, is not liable to be taken upon process for the collection of his debts, and if so taken, the real owner, entitled to immediate possession, may sustain replevin;⁶ but cases often arise where a bailee has an interest in the property bailed, which may be seized and sold on process against him. For example, if one hire a horse for a year, and acquire the right to exclusive possession for that time, his interest may be taken and sold on execution. In this case, only the interest of the bailee, not the general property,

¹ *Hunt v. Chambers*, 1 Zab. (21 N. J.) 620; *Cleaves v. Herbert*, 61 Ill. 127.

² *Childs v. Childs*, 13 Wis. 20; *McLaughlin v. Piatti*, 27 Cal. 452.

³ *Bowen v. Fenner*, 40 Barb. 385; *Roberts v. Wyatt*, 2 Taunt. 268; *Burton v. Hough*, 6 Mod. 334; *Pain v. Whittaker, Ry. & Moody*, 99.

⁴ *Summons v. Austin*, 36 Mo. 308; *Ingersoll v. Emmerson*, 1 Carter, (Ind.) 78.

⁵ *Williams v. West*, 2 Ohio St. 83,

⁶ *Robinson v. Champlin*, 9 Iowa, 91.

would pass by such a sale.¹ Where plaintiff leased oxen to A. for three months, and they were levied upon by an attachment against A. before the three months had expired, the court was unanimous that, inasmuch as the plaintiff had no right to the immediate possession when the suit was begun, he could not recover in replevin, even though he was the general owner.²

§ 99. **Replevin lies at the suit of one entitled to the property for a special purpose.** Where a party bought five hundred head of cattle, and paid the full purchase price, the vendors agreeing that the purchaser might select that number from their herd and take immediate possession, the court intimated in argument, that he might, upon refusal of the vendors to permit him to make the selection, have replevied the whole herd, and selected his five hundred therefrom, and returned the remainder.³ No matter what the plaintiff's title may be, he cannot sustain the action against a defendant who had the right of possession at the time the suit was begun.⁴

§ 100. **Illustrations of the rule.** A multitude of cases will doubtless suggest themselves to the reader, where the necessities of commerce and business require that a party entitled to present possession of a chattel should find a ready and effective remedy to enforce his rights to it, against all persons, even the general owner, who acts in disregard of them. The bailee of a horse or ship for a special purpose, or for a stated time, the carrier who transports goods for hire, the commission man who advances money upon goods consigned to him, or the warehouse man who stores them at the owner's request, or the mechanic who repairs a watch or carriage, each has a

¹ *Caldwell v. Cowan*, 9 Yerg. (Tenn.) 262.

² *Collins v. Evans*, 15 Pick. 63. See, also, *Wheeler v. Train*, 3 Pick. 255; *Gordon v. Harper*, 7 Durnf. & East. 10 and 6; *Dixon v. Thatcher*, 14 Ark. 144; *Hunt v. Strew*, 33 Mich. 85; *Smith v. Plomer*, 15 East. 607; *Bruce v. Westervelt*, 2 E. D. Smith, (N.Y.) 240; *Cox v. Hardin*, 4 East. 211; *Forth v. Pursley*, 82 Ill. 152; *Wyman v. Dorr*, 3 Me. 183; *Templeman's Case*, 10 Mod. 25.

³ *McLaughlin v. Piatti*, 27 Cal. 452. See, also, *Wilson v. Royston*, 2 Ark. 315.

⁴ *Rucker v. Donovan*, 13 Kan. 251.

special property in the goods so placed in his possession, which is superior, until it is lawfully determined, to the rights of the owner. And it would be disastrous to commerce, as well as unjust to such bailee, if the owner were permitted to retake possession of his goods without first discharging the special lien of the bailee, and in a lawful manner putting an end to his title. The law therefore recognizes and protects the right of possession the same as it does absolute title.¹

§ 101. **The same.** When the plaintiff furnished cloth upon which to print calico, under an agreement that the calico was to be sold, and, after deducting advances, commissions, and cost of the cloth, the balance was to be paid to the printer, it was held that while the goods were in the hands of a factor for sale, the sheriff could not levy on them by virtue of an attachment or execution against the printer. The factor in such case having a special property in the goods, with possession and the right of possession, process against the printer was regarded the same as process against any stranger.² So, when a factor advances money on goods stored with him, and has a lien for his advances, the owner cannot sustain replevin until he tenders the advances and expenses.³

§ 102. **Ownership not necessarily determined in this action.** The general ownership of property is not necessarily determined in replevin, but the right of possession always is.⁴ Where the plaintiff, who was the general owner, sued a railroad company for goods which it refused to deliver unless the plaintiff signed a receipt stating that they were in good order, the detention was held to be rightful; the company had a right to require such a receipt; that the plaintiff had a right to examine the goods at the time and place of delivery, and before he could insist on removal.⁵

§ 103. **Borrower cannot set up title.** A simple borrower of property cannot set up title in himself against his bailee;

¹ *Williams v. West*, 2 Ohio St. 85.

² *Wood v. Orser*, 25 N. Y. 348.

³ *Tyus v. Rust*, 34 Geo. 382. See, also, *McCoy v. Cadle*, 4 Iowa, 558; *Corbitt v. Heisey*, 15 Iowa, 297.

⁴ *Warner v. Matthews*, 18 Ill. 83; *Rogers v. Arnold*, 12 Wend. 30.

⁵ *Skinner v. C. R. I. & P. R. R.*, 12 Iowa, 191.

he must restore the property before he can assert ownership in himself. A person claiming to be the owner cannot be permitted to employ such means to obtain possession of goods and then hold under pretense of superior title. The act of borrowing is such a recognition of the lender's title as estops the borrower from asserting ownership until after he has surrendered the goods.¹ So, when property was seized and the owner gave the officer a receipt for it, and then refused to deliver it, he was not allowed to set up title in himself as against the officer when sued by the latter.²

§ 104. **Carrier cannot show title in third party as a defense to an action by the shipper or consignee.** Neither can a carrier who acquired possession from a shipper excuse himself for a non-delivery by showing title in a third party or in himself. Though a seizure of the property upon a writ of replevin, or other legal process against the shipper or consignee might be shown, and would constitute a good defense to the carrier in an action against him for the goods.³

§ 105. **The legal title will prevail over the equitable.** In this action, as in other actions at law, legal title will in all cases prevail over a mere equitable title,⁴ but the fact that the plaintiff holds only as trustee for another, or as guardian or executor, will not debar him. So long as he holds the legal title, with the right to immediate possession, he may sustain replevin.⁵

§ 106. **An assignee in bankruptcy.** An assignee in bankruptcy takes the title of the bankrupt, and is entitled to the possession of the goods the same as the bankrupt was before the bankruptcy. Proceedings, however, by the assignee to recover the property of the bankrupt, do not usually take the

¹ *Simpson v. Wrenn*, 50 Ill. 224.

² *Brusley v. Hamilton*, 15 Pick. 40.

³ *G. W. Ry. Co. v. McComas*, 33 Ill. 185.

⁴ *Heyland v. Badger*, 35 Cal. 404; *Reese v. Harris*, 27 Ala. 306; *Killian v. Carrol*, 13 Ired. (N. C.) 431.

⁵ *Bergesch v. Keevil*, 19 Mo. 128. A father who is the natural guardian for his minor children has sufficient right to the possession of their property to enable him to sustain replevin against one who wrongfully takes or detains it. *Smith v. Williamson*, 1 Har. & J. (Md.) 147.

form of a suit in replevin, though such a suit would doubtless be sustained. The shorter and more effective course is by application to the court in a summary proceeding for the possession of the goods. A bankrupt has title against all but his assignee.¹ When in replevin against a sheriff he answered that he seized the goods on an attachment against one W., and that afterwards proceedings in bankruptcy were taken against W., who was adjudged a bankrupt, and that the assignee appointed by the court had demanded and taken all the goods, the answer was regarded as a sufficient defense for the sheriff.²

§ 107. **Right to present possession. does not depend on former possession.** A legal right to the possession of the goods at the time the suit was begun has been frequently held to be all that is essential to sustain replevin. But what circumstances invest a party with this right remains a question unsolved by the statement, and perhaps no rule can be given which will apply in all cases. Where the plaintiff asserts the right to present possession, his right to recover does not depend on the question as to whether he had the possession at any former time, but as to whether he had the right at the time the suit was begun.³ So, when the plaintiff is not entitled to bring suit for the goods without prior demand for the possession, and does begin suit without such demand, he is not entitled to possession at the time the suit was begun, and cannot succeed.⁴ Any fact showing that the plaintiff in replevin had no right to the immediate possession when he began his suit is a complete bar to the action.⁵

¹ *Sawtelle v. Rollins*, 23 Me. 199; *Fowler v. Down*, 1 Bos. & Pull. 44; *Hurst v. Gwennap*, 2 Stark. 306; *Webb v. Fox*, 7 Term. R. 392, 224.

² *Bolander v. Gentry*, 36 Cal. 109.

³ *Stoughton v. Rappalo*, 3 S. & R. 562; *Harlan v. Harlan*, 15 Pa. St. 513; *Shearick v. Huber*, 6 Binn. 3; *Hunt v. Strew*, 33 Mich. 85; *Herdie v. Young*, 55 Pa. St. 177; *Hatch v. Fowler*, 28 Mich. 210; *Morgner v. Biggs*, 46 Mo. 65. *Contra*, see *Cobb v. Megrath*, 36 Geo. 625.

⁴ *Alden v. Carver*, 13 Iowa, 254. See *Campbell v. Williams*, 39 Iowa, 646.

⁵ Consult the following cases: *Belden v. Laing*, 8 Mich. 503; *Clark v. West*, 23 Mich. 242; *Davidson v. Waldron*, 31 Ill. 120; *Hill v. Freeman*, 3 Cush. 260; *Dixon v. Hancock*, 4 Cush. 96; *Waterman v. Robinson*, 5 Mass. 303; *Fairbank v. Phelps*, 22 Pick. 538; *Walcot v. Pomeroy*, 2 Pick. 121; *Whitwell v. Wells*, 24 Pick. 25; *Perley v. Foster*, 9 Mass. 112; *Ludden v. Leavitt*, 9 Mass. 104; *War-*

§ 108. Rule similar to that in trespass. The rule, as has been shown, is similar to that in trespass *de bonis asportatis*, and this latter action cannot be supported unless the plaintiff have the actual or constructive possession of the goods, or a general or special property in them, with a right to immediate possession when the injury was committed. It is not essential that the plaintiff should ever have had the actual possession, but he must have such a title as will authorize him to reduce the goods to his possession when he pleases.¹

§ 109. Prior rightful possession; when sufficient. It has been stated that prior rightful possession of property, without any other title, is sufficient to sustain the action against a wrongdoer, such possession being a good title until a better one be shown. Prior rightful possession is of itself *prima facie* proof of title, and as against all, except the owner, is

ren v. Leland, 9 Mass. 265; Mitchell v. Roberts, 50 N. H. 486; Wallace v. Brown, 17 Ark. 450; Hill v. Robinson, 16 Ark. 92; Britt v. Aylett, 6 Eng. (Ark.) 476; Wilson v. Royston, 2 Ark. 315; Dixon v. Thatcher, 14 Ark. 141; Parsons v. Boyd, 20 Ala. 117 Reese v. Harris, 27 Ala. 305; Bryan v. Smith, 22 Ala. 539; Beazley v. Mitchell, 9 Ala. 780; Parham v. Riley, 4 Cold. (Tenn.) 5. Ownership without right to possession is not sufficient. Williams v. West, 2 O. St. 83; Tison's Admr. v. Bowden, 8 Fla. 69; Neff v. Thompson, 8 Barb. 213; Johnson v. Neale, 6 Allen, 228; Brown v. Chickopee Falls Co., 16 Conn. 87; Tomlinson v. Collins, 20 Conn. 365; Smith v. Orser, 43 Barb. 187; Muggridge v. Eveleth, 9 Met. 233; Wade v. Mason, 12 Gray, 335; Bradley v. Michael, 1 Cart. (Ind.) 552; Pangburn v. Patridge, 7 John. (N. Y.) 140; Hotchkiss v. McViekar, 12 Johns. 403; Clark v. Skinner, 20 John. (N. Y.) 465; Marshall v. Davis, 1 Wend. 109; Hall v. Tuttle, 2 Wend. 475; Dubois v. Harcourt, 20 Wend. 41; Rogers v. Arnold, 12 Wend. 30. *Prima facie* title better than possession. La Fontaine v. Greene, 17 Cal. 296; Emmons v. Dowe, 2 Wis. 322; Rose v. Tolly, 15 Wis. 443; Beckwith v. Philleo, 15 Wis. 224; Sager v. Blain, 5 Hand, (N. Y.) 449; Wyman v. Dorr, 3 Gr. (Me.) 186; Pierce v. Stevens, 30 Me. (17 Shep.) 184; Southwick v. Smith, 29 Me. 229; School Dist. No. 5 v. Lord, 44 Me. 384; Melton v. McDonald, 2 Mo. 45; Ramsay v. Bancroft, 2 Mo. 151; Bush v. Lyon, 9 Cow. 53; Warner v. Hunt, 30 Wis. 201; Harrison v. McIntosh, 1 Johns. 380; Eisendrath v. Knauer, 64 Ill. 402; Skinner v. Stouse, 4 Mo. 93.

¹ Putnam v. Wyley, 8 Johns. 432; Cannon v. Kinney, 3 Scam. 9; Hume v. Tufts, 6 Blackf. 136; Boise v. Knox, 10 Met. 40; Bell v. Monahan, Dudley, (S. C.) 38; Crenshaw v. Moore, 10 Geo. 384; Lunt v. Brown, 13 Maine, 236; Heath v. West, 8 Foster, (N. H.) 101; Muggridge v. Eveleth, 9 Met. 233. *Contra*, Cobb v. Megrath, 36 Geo. 625.

sufficient to entitle the plaintiff to recover.¹ Where the plaintiff is able to show that the defendant was taking away property of which he had just before been in possession, claiming to own it, it is sufficient, at least, to put the defendant upon proof of his title or right to possession, and in the absence of such proof the plaintiff will be entitled to recover.² Such recovery is permitted on the presumption of ownership, which, in the judgment of the law, accompanies actual possession, but which may be rebutted by proof.³

§ 110. **The same.** If the right of the plaintiff is better than that of the defendant, whatever it may be with regard to the rest of the world, he can recover. Possession is sufficient evidence of right against every one who is not the true owner or rightfully entitled to possession by virtue of some superior right.⁴

§ 111. **Application of the rule.** The rule last stated requires some care in its application, as cases are found where the doctrine seems to be denied. Thus, where the plaintiff's title is denied in the pleadings, naked proof of possession would not suffice; the rule in such cases being that the plaintiff must make out his title by proof⁵—*i. e.*, he must recover on the

¹ *Hunt v. Chambers*, 1 Zab. (21 N. J.) 624.

² *Morris v. Danielson*, 3 Hill, 168.

³ *Moorman v. Quick*, 20 Ind. 68; *Miller v. Jones' Admr.*, 26 Ala. 260; *Shomo v. Caldwell*, 21 Ala. 448; *Bayless v. Lefavre*, 37 Mo. 119; *Duncan v. Spear*, 11 Wend. 54; *Daniels v. Ball*, 11 Wend. 58 note; *Smith v. Lydick*, 42 Mo. 209; *Johnson v. Carnley*, 10 N. Y. (Seld.) 579; *Davis v. Loftin*, 6 Tex. 495; *Cook v. Howard*, 13 Johns. 276; *Demick v. Chapman*, 11 Johns. 132; *Pangburn v. Patridge*, 7 Johns. 140; *Cresson v. Stout*, 17 Johns. 116; *Wheeler v. McFarland*, 10 Wend. 322; *Schermerhorn v. Van Volkenburgh*, 11 Johns. 529. "Possession is sufficient as against all persons not having a better title." *Bogard v. Jones*, 9 Humph. (Tenn.) 738; *Sawtelle v. Rollins*, 23 Me. 199; *Morris v. Danielson*, 3 Hill, 168; *Ingersoll v. Emerson*, 1 Carter. 76. "Possession is a right of property against all the world but the owner." *Armory v. Delamire*, 1 Str. 505; *Summons v. Austin*, 36 Mo. 308.

⁴ *Van Namee v. Bradley*, 69 Ill. 301; *Freshwater v. Nichols*, 7 Jones, (N. C.) 252. Possession, if recently before the taking, would raise a presumption of ownership which, unless contradicted, would be sufficient. *Hunt v. Chambers*, 1 Zab. (21 N. J.) 624; *Morris v. Danielson*, 3 Hill, 168; *Smith v. Graves*, 25 Ark. 461.

⁵ *Gartside v. Nixon*, 43 Mo. 138; *Gray v. Parker*, 38 Mo. 160; *Harrison v. McIntosh*, 1 Johns. 380.

strength of his own title, and not on the weakness of his adversary's, in support of which many cases may be cited.

§ 112. **The same.** Where the title is placed in issue, and proof of possession is made only as a circumstance tending to show title, the question of title, and not mere possession, must govern,¹ the burden of proof, in such cases, being on the plaintiff.² One of the reasons for this rule is found in the fact that the plaintiff's title or right of possession in this action is always in question. Unless admitted, it must be maintained by a preponderance of proof. The defendant's title is in no way impeached by the plaintiff's affidavit, or by the writ, if he fails to establish his title at the trial.³

§ 113. **Rightful possession evidence of title.** But, possession of goods under a claim of ownership is of itself one of the strongest evidences of title; and the plaintiff who has shown such possession has fully complied with the obligation to show title; and if such possession be shown to be long continued and open, under a claim of ownership, the law will presume title;⁴ and naked claim of title, no matter how formally pleaded, ought not to be sufficient to overcome such title. If, therefore, the plaintiff is able to show an undisputed possession, under a claim of ownership for a length of time, such possession alone will be sufficient to entitle him to recover against a defendant who has wrongfully deprived him of such possession, unless the latter show something more than a mere assertion of title in his pleading.⁵

§ 114. **Conflicting claims to possession.** Where the plain-

¹ *Hatch v. Fowler*, 28 Mich. 206.

² *Patterson v. Fowler*, 22 Ark. 398; *Simcoke v. Fredericks*, 1 Ind. 54. In *Broadwater v. Darne*, 10 Mo. 285, the court says that bare possession, without other right, will not support the action. "When the defendant has become bankrupt, and cannot defend, it will not do away with the necessity of proof on the part of the plaintiff." *Hallett v. Fowler*, 8 Allen, 93. In this action, as in ejectment and trover, the plaintiff must maintain his title, or fail in his action. *Davidson v. Waldron*, 31 Ill. 120.

³ *Dows v. Green*, 32 Barb. 490; *Barnes v. Bartlett*, 15 Pick. 75; *Bogard v. Jones*, 9 Humph. (Tenn.) 739; *Fowler v. Down*, 1 Bos. & Pull. 44.

⁴ *Shomo v. Caldwell*, 21 Ala. 448; *Robinson v. Calloway*, 4 Ark. 100; *Sprague v. Clark*, 41 Vt. 6; *Dixon v. Thatcher*, 14 Ark. 141.

⁵ *Smith v. Graves*, 25 Ark. 461; 2 Greenleaf on Ev. 637.

tiff shows ownership of the property in himself, a short possession by the defendant, without plaintiff's knowledge or acquiescence, will not amount to title in the defendant;¹ and when possession alone is relied upon by plaintiff, a prior possession of as high a character by the defendant, in the absence of any proof of ownership, is a better proof of a right to present possession than subsequent possession of the plaintiff.²

§ 115. The possession must be under a claim of right. As before stated, actual possession of property, when accompanied by a claim of ownership, is *prima facie* evidence of such ownership. And the simple possession of chattels, without other title, is regarded a sufficient evidence of ownership to sustain an action against one who wrongfully usurps possession;³ but this must be possession by the plaintiff in his own right, and under a claim of right, not as servant of another. A servant who has the goods of his master, and who must surrender them on demand, has no such possession as will enable him to sustain the action.⁴ The possession must also be under a claim of right in the plaintiff himself.⁵ It must also be a rightful possession, acquired without force or fraud.⁶

§ 116. But need not be under a claim of title. Finder of property. But the possession need not be accompanied by a claim of absolute ownership. The finder of property has an undoubted right to retain possession against all the world until the rightful owner appear to claim his property, or the authorities lawfully interfere to take charge of it, as they do in some cases; and if, while the finder is in possession, looking for the owner, another, by fraud or superior force, take the property from him,⁷ trover or replevin will undoubtedly lie, at the suit

¹ *Tompkins v. Haile*, 3 Wend. 406.

² *Summons v. Austin*, 36 Mo. 308.

³ *Davis v. Loftin*, 6 Tex. 497; *Scott v. Elliott*, Phil. (N. C. L.) 104.

⁴ *Mitchell v. Hinman*, 8 Wend. 667; *Brownell v. Manchester*, 1 Pick. 232; *Stanley v. Gaylord*, 1 Cush. 536; *Harris v. Smith*, 3 S. & R. 23; *Bond v. Padelford*, 13 Mass. 395; *Perley v. Foster*, 9 Mass. 114; *Summons v. Austin*, 36 Mo. 308.

⁵ Cases last cited. *Holliday v. Lewis*, 15 Mo. 406.

⁶ *Hatch v. Fowler*, 28 Mich. 205; *Bayless v. Lefavre*, 37 Mo. 120.

⁷ *Armory v. Delamire*, 1 Stra. 505.

of the finder. So money picked up on the floor of a shop,¹ or found in a railroad car,² belongs to the finder, rather than to the owner of the shop or car, and he may recover it or its value;³ but money laid down by the owner in a shop or bank is regarded as left in the custody of the owner of the shop or bank, rather than in the care of a chance finder.⁴ Where one had a simple authority to recover animals which had strayed, and of which he never had possession, and for which he was in no way responsible to the owner until he should have possession, he had no such title as would authorize him to bring replevin.⁵

§ 117. **The same.** The plaintiff bought an old safe, and left it for sale, with permission to the defendant to use it until sold. Defendant afterwards found a package of money in it. The plaintiff demanded the money, which was refused. He then demanded the safe and contents. The safe was at once delivered, and plaintiff sued for the money. Plaintiff did not claim any right to the money as against the real owner, but claimed that, as against the defendant, he had a better right. The plaintiff never had possession, except unwittingly, and it was held, as against him, the finder had the superior right. The place of finding did not change the rights of the parties.⁶ Perhaps, however, if the question had been between the original owner of the safe and the finder, the result would have been different. Under the cases cited in the preceding section, the money would probably have been held to be left in the care of the owner of the safe.

§ 118. **The lien of a finder for reward offered.** The finder of property lost or stolen has a lien on it for the reward offered by the owner for its recovery. The owner, by public offer of

¹ *Bridges v. Hawkesworth*, 7 E. L. & Eq. Rep. 424.

² *Tatum v. Sharpless*, 6 Phila. 18.

³ Consult *Regina v. West*, 1 Dearsley C. C. 402; *People v. McGarren*, 17 Wend. 460.

⁴ *State v. McCann*, 19 Mo. 249; *McAvoy v. Medina*, 11 Allen, 548; *Lawrence v. The State*, 1 Humph. (Tenn.) 228; *McLaughlin v. Waite*, 9 Cow. 670; *McLaughlin v. Waite*, 5 Wend. 405.

⁵ *Holliday v. Lewis*, 15 Mo. 406.

⁶ *Durfee v. Jones*, 11 R. I. 590.

reward, constitutes the finder his bailee, to take and care for the property;¹ but a finder who voluntarily incurs expense in keeping or caring for property he has found, unless necessary for its preservation, has no right to retain it for the purpose of enforcing his claim.

§ 119. Finder of a note has no right to collect it. The finder of a note, bill or lottery ticket, while he may retain it as against all but the owner, has no such right to the money due or payable thereon as will authorize him to recover it from the person promising to pay.²

§ 120. Where the title is the issue, good title must be shown. A party rightfully in possession cannot, as against an intruder or wrong doer, be required to show title beyond proof of his possession in the first instance; but when he undertakes to show title, and bases his right on title, rather than possession; he must show a sufficient title.³

§ 121. The nature of the special property necessary to sustain replevin. The exact nature of the special property which will sustain the action has not been very accurately defined. Greenleaf says:⁴ "Special property, in a strict sense, may be said to consist in the lawful custody of property with a right of detention against the general owner. But a lower degree of interest will sometimes suffice against a stranger or wrong doer. For a wrong doer is not permitted to question the title of one in actual possession of goods whose possession he has invaded." This doctrine was cited approvingly in an Illinois case.⁵ A definition of this special property ample enough to embrace all cases would be too general to be of great value in any particular case. A statement of some of the principles which govern in particular cases will convey the best idea of the rule. When one has a temporary property, with right of possession of a chattel, and delivers it to the general owner

¹ *Cummings v. Gann*, 52 Pa. St. 489.

² *McLaughlin v. Waite*, 5 Wend. 405; *McLaughlin v. Waite*, 9 Cow. 670; *Killian v. Carrol*, 13 Ired. (N. C.) 431.

³ *Hatch v. Fowler*, 28 Mich. 205.

⁴ Greenleaf on Evidence, 637.

⁵ *Eisendrath v. Knauer*, 64 Ill. 402

for a special purpose, he may maintain replevin for it after that purpose has been accomplished.¹

§ 122. **General owner usually entitled to possession; exceptions.** As a general rule it may be said that a right of property carries with it a right of possession.² But the right of the general owner to present possession of property may be suspended in a variety of ways; as when he deposits it as security for a loan, or where he delivers possession to a mechanic for repairs, the mechanic has a right to retain the property until reasonable or stipulated compensation is paid. In these and similar cases the rights of the general owner await the temporary, but superior right of the bailee, and until these latter are discharged the bailee, and not the general owner, will be the proper plaintiff in replevin.³

§ 123. **Liens.** In discussing the question as to what title or what special property in the plaintiff is sufficient to sustain the action of replevin, or what title in the defendant will defeat it, there is no question of more importance than the question of liens. The general principle may be stated that when one has possession of goods with a valid lien thereon against the owner, the owner's right to possession is suspended until the lien is legally discharged.⁴

§ 124. **The same.** Among the most familiar instances of liens are bailees for special purpose. The workman who repairs a carriage or watch for the owner has, unless some special contract exists, a lien on the article until paid for his services.⁵ So warehousemen are entitled to a lien on property stored with them until their proper charges are paid.⁶ The taker up of a stray animal, who properly conforms to the law relating

¹ *Roberts v. Wyatt*, 2 Taunt. 268; *Eisendrath v. Kanuer*, 64 Ill. 402; *Rich v. Ryder*, 105 Mass. 310.

² *Wilson v. Royston*, 2 Ark. 315.

³ *Wallace v. Brown*, 17 Ark. 450.

⁴ *Moore v. Hitchcock*, 4 Wend. 293; *Everett v. Coffin*, 6 Wend. 603; *Bush v. Lyon*, 9 Cow. 52; *Jones v. Sinclair*, 2 N. H. 319; *M'Combie v. Davies* 7 East. 5; *Wilbraham v. Snow*, 2 Saund. 47.

⁵ *Hollingsworth v. Dow*, 19 Pick. 228; *Morgan v. Congdon*, 4 Comst. 552; *M'Intyre v. Carver*, 2 Watts & Serg. 392; *Curtis v. Jones*, 3 Denio, 590.

⁶ *Platt v. Hibbard*, 7 Cow. 497; *Tyus v. Rust*, 34 Geo. 328.

to estrays, has a lien for his lawful charges.¹ An innkeeper who entertains the traveler has a lien for his charges on the chattels of his guest in the inn or its stables.² When a factor advances money on goods consigned to his care or for sale on commission, he has a lien, or qualified right to possession of the goods, and may retain them until his lien is satisfied.³ In these and other kindred cases, when a lien exists the right of the general owner is subservient to the lien, and before he can be permitted to assert his title he must show that the lien has been discharged.

§ 125. **The same.** When one has a lien on property which is forcibly and clandestinely taken from him, he can sustain replevin for its recovery. Thus, a hotel keeper has a lien on his guest's horses; and in some States a livery stable keeper has a lien on horses boarded with him; and when he keeps several for the same owner the lien is not against each horse, but is against the owner and upon all the horses, and one may be detained for the keeping of all.⁴

§ 126. **The same. Taking up of an estray.** When a person has taken up an estray, and advertised it according to law, he has a lien upon and a right to retain it until the lien is satisfied, and may maintain replevin against the owner who takes it away without paying the lawful charges.⁵ But this lien is given by statute. The owner cannot be deprived of his property, or the right to immediate possession, except by a proceeding in accordance with the statute. A party, therefore, who asserts title under a law respecting the taking up of estrays, must comply strictly with the provisions of the statute, or his lien will be lost.⁶ The taker up of an estray, who duly complies with the law with reference thereto, has an unquestionable lien upon the property until his legal charges

¹ *Phelan v. Bonham*, 4 Eng. (Ark.) 389; *Bayless v. Lefavre*, 37 Mo. 119.

² *Thompson v. Lacy*, 3 Barn. & Ald. 287; *Turrill v. Crawley*, 13 Ad. & El. 197; *Sunbolf v. Alford*, 3 Mees. & W. 248.

³ *Wood v. Orser*, 25 N. Y. 349; *Brownell v. Carnley*, 3 Duer, (N. Y.) 9; *Holbrook v. Wight*, 24 Wend. 169.

⁴ *Young v. Kimball*, 23 Pa. St. 195.

⁵ *Ford v. Ford*, 3 Wis. 399; *Bayless v. Lefavre*, 37 Mo. 119.

⁶ *Brown v. Smith*, 1 N. H. 36; *Morse v. Reed*, 28 Me. 481.

are paid. And, to the extent of his lien, he has a special property in the animal taken up, and may assert it, it would seem, against the owner who takes the property without complying with the law.¹

§ 127. **Goods lost at sea.** Where goods were found upon the ocean, and by the salvors brought into port, it was held that the ownership had been changed to the insurer by the abandonment; that the insurers of goods abandoned to them had acquired property in them, and that they, with the owners of the goods not insured, were the owners, subject to the lien of the salvors; that the salvors had simply a lien, and had no right to sell or pledge the goods, and a party purchasing from them could not sustain replevin.²

§ 128. **Goods in possession of one's servant.** When goods are taken from a carrier by process against him, the owner may sustain an action against the taker, the owner being regarded as in possession, and the carrier as his servant. Such a case presents a marked distinction from the case of one who hires goods for a stated period.³

§ 129. **Contract for purchase of property does not necessarily confer a right of possession.** When the plaintiff claims to have bought the property, of which he never had the possession or right to possession, replevin will not lie; the proper remedy being an action for a failure to complete the contract of sale.⁴ Plaintiff bought a horse for one thousand dollars, and paid one hundred dollars, and was to have the horse on payment of nine hundred dollars more within thirty days. It was held to be an executory, not an executed contract. And the fact that, pending the contract, the defendant trotted the horse, would not enable the plaintiff to maintain trover until after the conditions were complied with.⁵

¹ *Ford v. Ford*, 3 Wis. 399; *Morse v. Reed*, 28 Me. 481; *Barnes v. Tannehill*, 7 Blackf. 606; *Bayless v. Lefaire*, 37 Mo. 119; *Hendricks v. Decker*, 35 Barb. 298.

² *Whitwell v. Wells*, 24 Pick. 31.

³ *G. W. R. R. Co. v. McComas*, 33 Ill. 186.

⁴ *Haverstick v. Fergus*, 71 Ill. 105.

⁵ *Whitcomb v. Hungerford*, 42 Barb. 177. See, also, *Stevens v. Eno*, 10

§ 130. **An officer levying process has a special property, and a right to possession.** An officer has a special property by the lien of an execution in his hands, and has sufficient property in goods that are levied on to sustain replevin against the owner who is defendant in the process, or any one who wrongfully takes them.¹ But an officer has no such lien until he has actually levied on the property;² and after the levy and execution was set aside, the officer could not recover.³ When an officer claims title to property upon a process in his hands, he must not only show a process regular on its face, but a valid judgment.⁴

§ 131. **Possession of a receiptor to an officer.** But whether a receiptor to the sheriff, who has levied on the goods, can maintain this action, is a question upon which the authorities are somewhat variant. In New York, the possession of the receiptor is the possession of the officer.⁵ When goods were attached by the sheriff, and left in the hands of the debtor, who gave a receipt, and they were afterward attached by another creditor, the attachment by the second officer might be regarded as a trespass on the right of the first, but not on the right of the debtor. The latter cannot complain as owner, and also as bailee of the first. He has no such special property in the goods as would entitle him to bring replevin in his own name.⁶

Barb. 95; *Lester v. East*, 49 Ind. 588; *Roper v. Lane*, 9 Allen, (Mass.) 510; *Updike v. Henry*, 14 Ill. 378; *Golder v. Ogden*, 15 Pa. St. 528.

¹ *Martin v. Watson*, 8 Wis. 315; *Rhoads v. Woods*, 41 Barb. 471; *Mulheisen v. Lane*, 82 Ill. 117; *Dayton v. Fry*, 29 Ill. 529; *Dezell v. Odell*, 3 Hill, 215; *Morris v. Van Voast*, 19 Wend. 283; *Clark v. Norton*, 6 Minn. 412; *Lockwood v. Bull*, 1 Cow. 333; *Dunkin v. McKee*, 23 Ind. 447; *Walpole v. Smith*, 4 Blackf. 304; *Whitney v. Burnette*, 3 Wis. 625.

² *Mulheisen v. Lane*, 82 Ill. 117. "The sheriff who has seized the goods of a debtor on execution has a special property in them, and, if they are taken from him, he may sustain trover, trespass or replevin." *Ladd v. North*, 2 Mass. 516; *Pomeroy v. Trimmer*, 8 Allen, 399; *Fitch v. Dunn*, 3 Blackf. (Ind.) 142.

³ *Walpole v. Smith*, 4 Blackf. (Ind.) 304.

⁴ *Yates v. St. John*, 12 Wend. 74; *Earl v. Camp*, 16 Wend. 562; *Dunlap v. Hunting*, 2 Denio, 643.

⁵ *Mitchell v. Hinman*, 8 Wend. 667; *Phillips v. Hall*, 8 Wend. 610.

⁶ *Brown v. Crocket*, 22 Me. 540. See *Butts v. Collins*, 13 Wend. 139;

§ 132. An agent who is responsible to the owner has sufficient possession to sustain replevin. An auctioneer agent who is responsible to the owner may have replevin for goods committed to his possession and sold by him, and not paid for according to the conditions of the sale; this being a special property sufficient to sustain the action.¹

§ 133. Wrongful seizure or sale by an officer does not affect owner's right. The wrongful sale of one's property, on an execution against a third party, does not divest title, and the owner can sustain replevin;² and, generally, in all cases where an officer wrongfully seizes and sells goods, the title is not divested by such sale, and the owner may have replevin for the goods against the purchaser.³

Miller v. Adsit, 16 Wend. 335; Browning v. Hanford, 5 Hill, 588; Dezell v. Odell, 3 Hill, 215. *Contra*, Burrows v. Stoddard, 3 Conn. 160.

¹ Tyler v. Freeman, 3 Cush. 261.

² Dodd v. McCraw, 8 Ark. 83.

³ Eggleston v. Mundy, 4 Mich. 295; Ward v. Taylor, 1 Pa. St. 238; Shearick v. Huber, 6 Binn. (Pa.) 2.

CHAPTER V.

POSSESSION BY THE DEFENDANT.

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Proof that the defendant was about to take possession will not sustain replevin	137	Or put it out of the officer's power to execute the writ	146
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§ 134. **Replevin does not lie against one not in possession of the goods.** It is also a rule in replevin that the action only lies against a defendant who is in possession of the goods at the time the demand is made or suit is begun. In order to hold a party liable for the immediate delivery of the goods, he must have the actual or constructive possession of them at the time, so that he can comply with the demand if made, or with the mandate of the writ for delivery if it should issue against him.¹ A wrongful taking unless followed by a wrong-

¹ *Ames v. Miss. Boom Co.*, 8 Minn. 470; *Brockway v. Burnap*, 8 How. Pr. Rep. 188; *Roberts v. Randel*, 3 Sandf. (N. Y.) 707; *Bradley v. Gamelle*, 7 Minn. 331; *Hall v. White*, 106 Mass. 600; *McCormick v. McCormick*, 40

ful detention will not sustain the action.¹ In trespass, the restoration of the goods would be no bar to the suit. The action having once accrued, no act of the defendant's can deprive the plaintiff of it; but replevin, for the delivery of specific goods, only lies in case the goods are detained. Where the statute allows the plaintiff to have judgment for the goods or for their value, at his option, the reason for this rule would not apply.

§ 135. **The same; some exceptions.** For instance, a wrongful taking followed by an immediate restoration of the goods; or, where the taking though wrongful was in ignorance of the plaintiff's rights, and the goods have been in good faith sold or disposed of, before demand or suit brought; or, when the property has been destroyed; or, an animal has died; in such case some other action than replevin must be pursued.² The gist of the action being the wrongful detention,³ it lies for goods wrongfully detained though the taking was rightful;⁴ but does not lie, unless there is a wrongful detention at the time the suit is brought.⁵ In New York, a statutory provision allows the arrest of the defendant whenever it is shown that he has concealed, removed or disposed of the property to avoid the writ, or deprive the plaintiff of the benefit of it;⁶ and the courts hold, that in such cases, that the action may be prosecuted where the defendant has not the possession of the goods, having parted with them for the purpose of avoiding

Miss. 760; *Burton v. Brashear*, 3 A. K. Marsh, (Ky.) 277; *Howe v. Shaw*, 56 Me. 291; *Grace v. Mitchell*, 31 Wis. 536; *Baer v. Martin*, 2 Carter, (Ind.) 229; *Myers v. Credle*, 63 N. C. 505.

¹ *Savage v. Perkins*, 11 How. Pr. Rep. (N. Y.) 17; *Paul v. Luttrell*, 1 Col. 317.

² *Meriden v. Wheldon*, 31 Conn. 118; *Lindsay v. Perry*, 1 Ala. (n. s.) 204; *Richardson v. Reed*, 4 Grey, 442; *Coffin v. Gephart*, 18 Iowa, 257; *Moore v. Kepner*, 7 Neb. 294.

³ *Haggard v. Wallen*, 6 Neb. 272; *Mercer v. James*, 6 Neb. 406.

⁴ *Esson v. Tarbell*, 9 Cush. 407; *Waterman v. Matteson*, 4 R. I. 539; *Dimond v. Downing*, 2 Wis. 498.

⁵ *Savage v. Perkins*, 11 How. Pr. 17; *Hayward v. Seaward*, 1 Moore & Scott, 459.

⁶ *Watson v. McGuire*, 33 How. Pr. Rep. 87. See *Barnett v. Selling*, 70 N. Y. 492.

the writ;¹ but as we shall see, this ruling does not depend entirely upon the statute, but applies independent of the statute in many cases where the defendant has put the property out of his hands to avoid the writ.

§ 136. **The writ lies only for property in existence.** The property must also be in being, of tangible or appreciable form, subject to manual delivery, thus for the young which animals are expected to produce, replevin is not the remedy.² When A. agreed that his horse should serve the mare of B. upon condition that the produce should belong to C. *Held*, that C. took a sufficient title to sustain trover, but could not have replevin before the colt should be foaled.³ Neither will the action lie for property destroyed, or for a slave who died before suit commenced;⁴ but the plaintiff may have judgment for the young of animals recovered by him, notwithstanding they may have been born after the suit was begun.⁵

§ 137. **Proof that the defendant was about to take possession will not sustain replevin.** As has been stated, the action is in the nature of a proceeding *in rem* for the delivery of the identical goods, and in such actions the defendant must have the actual or constructive possession of the property sued for at the time suit is brought, as the action lies only against one who has such possession and can deliver the goods sued for.⁶ Proof, therefore, that the defendants were about to take possession, but had not actually done so, will not sustain the action;⁷ nor will proof that the defendant intended or agreed to convert the goods to his own use, amount to a conversion, without some actual interference with the property.⁸

¹ *Ellis v. Lersner*, 48 Barb. 539; *Nichols v. Michael*, 23 N. Y. 264.

² *Lindsay v. Perry*, 1 Ala. 203; *Chissom v. Hawkins*, 11 Ind. 318.

³ *McCarty v. Blevins*, 5 Yerger, (Tenn.) 196.

⁴ *Burr v. Dougherty*, 21 Ark. 559; *Caldwell v. Fenwick*, 2 Dana, (Ky.) 333.

⁵ *Buckley v. Buckley*, 12 Nev. 426.

⁶ *Lathrop v. Cook*, 2 Shep. (Me.) 414; *Sawyer v. Huff*, 12 Shep. (Me.) 464; *Small v. Hutchins*, 1 Appl. (19 Me.) 255; *Learned v. Bryant*, 13 Mass. 224; *McCormick v. McCormick*, 40 Miss. 761; *Gaff v. Harding*, 48 Ill. 148.

⁷ *Whitwell v. Wells*, 24 Pick. 29.

⁸ *Herron v. Hughes*, 25 Cal. 555. See *Squires v. Smith*, 10 B. Mon. (Ky.) 34.

§ 138. **Neglect to deliver; when not a conversion.** When at the time of the service, the defendant was not in possession of the property, and denied having anything to do with it, but pointed out his son in whose house he lodged, who was then present and had possession; *held*, the action could not be sustained against the father, even though he advised his son not to deliver it.¹

§ 139. **The same.** When the plaintiff and his wife occupied separate parts of the wife's house, pending a suit for divorce, after the divorce the plaintiff suffered his goods to remain in the house; afterwards, when plaintiff was out, the defendant fastened up the doors and windows. The plaintiff demanded to be let into the house, but did not demand the goods, the defendant offered to put out his property, but the plaintiff forbid her to do so, and brought replevin. *Held*, that the defendant was not guilty of detaining; she excluded the plaintiff from her building as she had a right to do, but there was nothing to show taking or detention of the goods.² And the rule appears general, that mere neglect to deliver goods unless they are actually in the defendant's possession at the time of demand, will not amount to a conversion.³

§ 140. **Taking under a license not a conversion.** When the taking was made under an implied license to the taker, no conversion results. When H. hired a buggy and injured it, it was agreed that he should pay for the repairs; plaintiff took it to a shop for repair; next day, H. went to the shop and the buggy not being repaired or in process of repair, he took it to another shop and had it repaired; he did not take or obtain it for his own use or the use of anyone else, it was not injured in his possession, and in fact, no element of conversion appeared in any act of the defendant.⁴ Such a taking is looked upon as by the owner's consent, rather than wrong-

¹ Johnson Admr. v. Garlick, 25 Wis. 705; Timp v. Dockham, 32 Wis. 151; Grace v. Mitchell, 31 Wis. 539.

² Bent v. Bent, 44 Vt. 634.

³ Whitney v. Slauson, 30 Barb. 276; Hawkins v. Hoffman, 6 Hill, 586; Hill v. Covell, 1 Comst. 522; Hall v. Robinson, 2 Comst. 293; Miller v. Ill. Cent. R. R. Co., 24 Barb. 313.

⁴ Eldridge v. Adams, 54 Barb. 417.

ful, but if the defendant while so in the actual possession of the goods had refused to deliver on demand, or done any act inconsistent with the owner's right, he would have been liable.

§ 141. **A firm may be responsible for the act of one member.** A firm may be responsible in this action for the taking and detention by one member when he acts for and on the part of all, though if his wrongful act was without the consent of the others, he would alone be liable.¹

§ 142. **Taking by an officer; when sufficient to render him liable in this action.** Where the defendant was an officer who had levied on property, but did not remove it, the defendant in the execution who still retained the goods, will not be permitted to sustain replevin against the officer, as the possession was still in himself;² but when an officer levies on goods, and takes an inventory, and directs a receptor to prevent their removal, he has a sufficient possession to enable the owner to sustain replevin.³ And such a taking is sufficient ground on which to base an action against the officer.

§ 143. **Possession by an officer not possession of the creditor in the writ.** The actual possession of an officer who has seized goods on process in his hands, is not the constructive possession of the creditor in the writ.⁴ An attachment creditor, therefore, is not jointly liable with the officer. He has no property in the goods, entire, general or special, and no possession or right of possession.⁵ But where the attaching creditor claimed to be the owner of the property, and attached the goods to get possession of them, and had them in posses-

¹ *Howe v. Shaw*, 56 Me. 291.

² *Hickey v. Hinsdale*, 12 Mich. 100. See *Mitchell v. Roberts*, 50 N. H. 486; *Ramsdell v. Buswell*, 54 Me. 548, overruling *Sayward v. Warren*, 27 Me. 453; *English v. Dalbrow*, Miles (Pa.) 160; *Wood v. Orser*, 25 N. Y. 355; *Angel v. Keith*, 24 Vt. 373.

³ *Fonda v. Van Horne*, 15 Wend. 632.

⁴ *Gallagher v. Bishop*, 15 Wis. 282; *Booth v. Ableman*, 16 Wis. 460; *Iisley v. Stubbs*, 5 Mass. 283; *Smith v. Orser*, 43 Barb. 187; *Grace v. Mitchell*, 31 Wis. 533.

⁵ *Douglass v. Gardner*, 63 Me. 462; *Richardson v. Reed*, 4 Grey, 442; *Ladd v. North*, 2 Mass. 516; *Grace v. Mitchell*, 31 Wis. 533; *Small v. Hutchins*, 19 Me. 255; *Mitchell v. Roberts*, 50 N. H. 486. *Contra*, see *Hathaway v. St. John*, 20 Conn. 346; *Bowen v. Hutchins*, 18 Conn. 550.

sion, he was liable in replevin as well as in trespass or trover;¹ and where the plaintiff in an execution directed the sheriff to levy on certain articles belonging to another party, the court considered the officer as the servant or agent of the plaintiff in execution, and sustained replevin against him, notwithstanding he was never in actual possession of the property.² Where an officer has levied on bulky articles, and endorses his levy on his process, and refuses to give them up, but asserts his right, he has such a possession as will justify replevin against him, there being no actual possession and control of the goods in any other person.³

§ 144. **Servant not usually liable for holding his master's goods.** As a general rule, the possession of the defendant must be a possession under some claim of right in himself. A servant is not, as a general thing, a proper defendant in replevin, when he only holds the goods as his master's, unless he is guilty of some wrongful act.⁴ So, where a servant refuses to deliver goods entrusted to him by his master, without his master's order, the servant is not personally liable in replevin, the master being the proper defendant,⁵ the possession being the possession of the master. So, in trover for a note, the defendant claimed to be agent for his wife, and the possession was regarded as in the wife.⁶ But the agent of an express company may be sued if he refuse to deliver goods after payment or tender of legal charges.⁷

§ 145. **Where defendant has put the goods out of his possession.** There are cases which hold that the action may, under certain circumstances, be brought against a defendant after he has parted with the possession of the goods; thus, when the defendant has let the goods for hire, and it appears

¹ *Tripp v. Leland*, 42 Vt. 488.

² *Allen v. Crary*, 10 Wend. 349.

³ *Hatch v. Fowler*, 28 Mich. 212.

⁴ *Bennett v. Ives*, 30 Conn. 329; *Owen v. Gooch*, 2 Esp. 567.

⁵ *Mires v. Solebay*, 2 Mod. 242; *Mount v. Derick*, 5 Hill, 456; *Storm v. Livingston*, 6 Johns. 44; *Alexander v. Southey*, 5 Barn. & Ald. 247.

⁶ *Hunt v. Kane*, 40 Barb. 638. See *Matteawan Co. v. Bentley*, 13 Barb. 643.

⁷ *Eveleth v. Blossom*, 54 Me. 447.

he can resume them at pleasure.¹ Also, where the defendant has lately had possession of the goods, and has fraudulently made away with them, for the purpose of defeating the action, it may sometimes be sustained.² Where defendant was charged with fraudulently obtaining possession of plaintiff's property, and consigning it to his uncle in London, and that he had drawn drafts on the bill of lading, payable when it should arrive, the plaintiff might sustain action.³ It will be seen that it is not absolutely necessary to sustain the action, that the officer be able to find and deliver the goods. Exceptions to the general rule arise in many cases.

§ 146. Or put it out of the officer's power to execute the writ. When the defendant puts it out of the power of the officer to proceed and execute the writ, the plaintiff may be allowed to proceed with the case and recover the full value of the goods, with damages for the detention.⁴ Where the writ was for rails, and the defendant took part of them and built them into a fence, it was admitted the sheriff could not take them; but the plaintiff was permitted to recover damages to the full value. To permit the defendant so to take advantage of his own wrong

¹ *Gaines v. Harvin*, 19 Ala. 491; *Bradley v. Gamelle*, 7 Minn. 331; *Harris v. Hillman*, 26 Ala. 383.

² *Drake v. Wakefield*, 11 How. Pr. Rep. 107; *Nichols v. Michael*, 23 N. Y. 264; *Ellis v. Lersner*, 48 Barb. 539; *Dunham v. Troy Union R. R. Co.*, 3 Keyes, (N. Y.) 543; *Savage v. Perkins*, 11 How. Pr. Rep. 17.

³ *Ellis v. Lersner*, 48 Barb. 539. See, also, *Burton v. Brashear*, 3 A. K. Marsh, (Ky.) 278; *Powers v. Bassford*, 19 How. Pr. 309; *Garth v. Howard*, 5 Car. & P. 352; *Ford v. Caldwell*, 3 Riley, (S. C.) 277, 3 Hill & New Ed., 2 Hill, *238; *Anderson v. Passman*, 7 C. & P. 193; *Harris v. Hillman*, 26 Ala. 380; *Clements v. Flight*, 16 Exch. 42; *Walker v. Fenner*, 20 Ala. 198; *Brockway v. Burnap*, 16 Barb. 309, overruling S. C. (12 Barb.) 347; *Southcote v. Bennett*, Cro. Eliz. 815; *Jones v. Dowle*, 9 M. & W. 19; *Garth v. Howard*, 5 C. & P. 346; *Anderson v. Passman*, 7 C. & Payne, 193; 8 B. & Ald. 703.

⁴ *Pomeroy v. Trimper*, 8 Allen, 403; *Bower v. Tallman*, 5 Watts & S. 561; *Baldwin v. Cash*, 7 Watts & S. 426. See able dissenting opinion in *Ramsdell v. Buswell*, 54 Me. 548; *Ross v. Cassidy*, 27-37 How. Pr. 416. In New York, when the defendant had put the property out of his hands, for the purpose of preventing the writ, the statute formerly allowed an arrest. *Roberts v. Randel*, 3 Sandf. (N. Y.) 707. Consult *Van Neste v. Conover*, 20 Barb. 547; *Ward v. Woodburn*, 27 Barb. 346; *Nichols v. Michael*, 23 N. Y. 264; *United States v. Buchanan*, 8 How. 83; *Brockway v. Burnap*, 16 Barb. 309.

is contrary to all the principles of the law.¹ When the officer caused the value of the property to be ascertained, and had taken security required by law, and had taken the property into his custody, when it was forcibly taken from him by the defendant, the plaintiff may proceed and recover the value as damages.

§ 147. **Fraudulent transfers of goods.** When one obtains goods by fraud, and had transferred them to a trustee for his creditors, a joint action lies against both.² Where A., without any authority, pledges the property of B. to C., action of detinue may be against both.³

§ 148. **Clothing worn on the person not subject to the writ.** While the property must be in the defendant's possession, yet it is not all property in his possession which is liable to be taken on a writ of replevin. Thus, where the property is in actual use by the defendant, or worn upon his person, as a jewel or watch, even though worn for the purpose of evading a seizure. The officers cannot take it so long as it continues to be worn on the person of the defendant. A man's clothes cannot lawfully be taken from his back, nor his watch from his pocket or his hand, by an officer upon a writ of replevin.⁴

§ 149. **Possession after dismissal of an action of replevin.** When the action of replevin was dismissed without an order for a return, the defendant is not liable to a second action for the same property, unless it appears that the goods have come into his possession, and that he has asserted a right or done some act inconsistent with the plaintiff's claim. The return of the property to an inn-keeper, from whose house it was taken, is not of itself a restoration to the defendant, unless he authorized or adopted the act as his own. The defendant in the first action made no claim to the property, and this would

¹ Bower v. Tallman, 5 W. & S. (Pa.) 561. See Snow v. Roy, 22 Wend. 604.

² Nichols v. Michael, 23 N. Y. 269.

³ Garth v. Howard, 5 Car. & P. 346.

⁴ Maxham v. Day, 16 Gray, (Mass.) 214; Gorton v. Falkner, 4 D. & East. 565 and 305; Storey v. Robinson, 6 Term. R. 139 and 73; Mack v. Parks, 8 Gray, (Mass.) 517; Sunbolf v. Alford, 3 Mees. & W. 248. As to whether the sheriff can break and enter a dwelling house, see *post*, power and duty of sheriff.

seem to indicate that he did not intend further to assert any claim to it.¹

§ 150. Defendant acquiring possession with plaintiff's consent. Where the defendant sells, or otherwise disposes of the goods, the owner standing by and making no objections, when he can, with propriety, speak, he cannot afterward sustain replevin against purchasers.² This rule finds numerous illustrations in different cases, but the general principle is the same in all—that when one stands by in silence and permits another to act upon an erroneous state of facts, to the injury of the person whom he suffered to remain in error, he is estopped from setting up his rights.³

§ 151. The action permitted in some States without delivery of the goods. In many of the States actions for the recovery of goods in specie may be prosecuted without asking a delivery of the goods until after the final judgment of the court on the merits of the controversy. In such case, the reason for the rule which forbids the action against any one not in possession fails; and, while adjudications directly on this question are not numerous, no reasons exist why, in such, the plaintiff may not have an alternative judgment, for the goods or their value, against a defendant, after he has parted with the possession, as well as before.

¹ *Way v. Barnard*, 36 Vt. 370.

² *Skinner v. Stouse*, 4 Mo. 93.

³ *Thompson v. Blanchard*, 4 N. Y. 303; *Erie Savings Bank v. Roop*, 48 N. Y. 292; *Brewster v. Baker*, 16 Barb. 613; *Otis v. Sill*, 8 Barb. 102; *Hope v. Lawrence*, 50 Barb. 258.

CHAPTER VI.

JOINT OWNERS.

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§ 152. One joint tenant cannot sustain replevin against his co-tenant. One joint tenant cannot sustain replevin against his co-tenant for the possession of the chattels owned by them in common, for the reason that, unless there be some agreement to the contrary, one has as much right to the possession of the joint property as the other.¹

¹ *Prentice v. Ladd*, 12 Conn. 331; *Russel v. Allen*, 13 N. Y. 173; *Wilson v. Reed*, 3 Johns. 177; *Ellis v. Culver*, 1 Har. (Del.) 76; *Barnes v. Bartlett*, 15 Pick. 71; *Hardy v. Sprowle*, 32 Me. 322; *Wills v. Noyes*, 12 Pick. 324; *Eakin v. Eakin*, 63 Ill. 160. But if one tenant in common destroys the thing, trover will lie. *Wilson v. Reed*, 3 Johns. 177; *Co. Litt. 200 a*. Tenants in common are not like partners. One partner may sell the firm

§ 153. The same. Appearing in the writ, or pleaded by the defendant. If the fact of joint tenancy be shown by the plaintiff in his pleadings, or in his writ, the suit must fail. The court will usually in such case direct that the writ abate,¹ and the defendant may have a return of the goods. But when the joint tenancy is pleaded by defendant, it is a matter of defense, and is the subject of proof. So when it appears during the trial that the parties own the property jointly, or are partners, the court will not for that reason dismiss the proceeding, but will leave it to the jury as one of the issues in the case, and will direct them, in case they find a joint tenancy, that the verdict must be found for the defendant.²

property without being liable in tort. *Fox v. Hanbury*, 2 Cowp. 450. But one partner cannot sustain replevin against his partner for the exclusive possession of the firm property. *Azel v. Betz*, 2 E. D. Smith, 188; *Holton v. Binns*, 40 Miss. 492; *Noble v. Epperly*, 6 Port. (Ind.) 416; *Mills v. Malott*, 43 Ind. 252; *Rogers v. Arnold*, 12 Wend. 30; *Eakin v. Eakin*, 63 Ill. 160; *Wetherell v. Spencer*, 3 Mich. 123; *Hill v. Robinson*, 16 Ark. 90; *Hardy v. Sprowle*, 32 Me. 322; *M'Elderry v. Flannagan*, 1 Har. & G. (Md.) 308. One partner cannot maintain replevin against the other for firm goods, and defendant may have return. *Reynolds v. McCormick*, 62 Ill. 415. See *Chambers v. Hunt*, 22 N. J. L. 554. The possession of one tenant in common is the possession of all. *Walker v. Fenner*, 28 Ala. 373. All the plaintiffs must be entitled to recover, or none of them can. *Id.* By the common law, if a woman own chattels in common with another, and marry, the tenancy in common ceases, and the husband becomes tenant in common with the others. *Walker v. Fenner*, 28 Ala. 373. Husband and wife could not be tenants in common, as her chattels are absolutely his. *Id.* If one tenant in common take all the goods, by common law, the other has no remedy, but might retake the goods, if he could. *Co. Litt.* 200 *a*; *Dixon v. Thatcher*, 14 Ark. 145; *M'Elderry v. Flannagan*, 1 H. & Gill. (Md.) 308; *Daniels v. Brown*, 34 N. H. 454. In some of the States, statutory enactments have changed or modified this rule; as, in California, a statute provided that "joint tenants" may jointly or severally bring or defend any civil action for the enforcement or protection of the rights of such party. This statute was construed, in *Schwartz v. Skinner*, 47 Cal. 6, which was a case for the undivided part of the furniture of a hotel. The defendant in possession refused to permit the plaintiff to take or share possession, and refused to pay any rent. The court directed a judgment for the plaintiff. The case of *Schwartz v. Skinner* seems to stand alone; but see *Bostick v. Brittain*, 25 Ark. 482; *Hewlett v. Owens*, 50 Cal. 475.

¹ *Hart v. Fitzgerald*, 2 Mass. 509.

² *Belcher v. Van Duzen*, 37 Ill. 282. Consult, also, *Hunt v. Chambers*, 1

§ 154. **Replevin does not lie for an undivided interest.** Replevin does not lie for an undivided interest in a chattel, as an undivided part is not susceptible of delivery without the whole.¹ The plaintiff must have an entire interest, or a right to the entire and exclusive possession, or his action must fail.² When a party claims only a lien unaccompanied by a right to possession, he cannot maintain replevin to obtain possession of the property in order to enforce his lien.³

§ 155. **Owners of separate interests cannot join, but joint owners must.** Where several plaintiffs claim several and distinct rights in the property they cannot join in an action for it.⁴ But where the goods are the joint property of several, all must join as plaintiffs or replevin will fail. One joint owner cannot sue alone and recover possession of the goods, even from a third party.⁵

§ 156. **Action by one of two joint owners does not lie against a stranger for the joint property.** It does not admit of dispute that one tenant in common cannot maintain replevin against his co-tenant. But the question has been suggested as to whether he could maintain the action against a stranger who wrongfully took the possession. There is no doubt that the part owner of chattel in his possession may support the action against one who, without right, should forcibly dis-

Zab. (N. J.) 620; *Chambers v. Hunt*, 2 Zab. (22 N. J.) 554; *D'Wolf v. Harris*, 4 Mason C. C. 515; *Holton v. Binns*, 40 Miss. 491.

¹ *Kindy v. Green*, 32 Mich. 310; *Price v. Talley's Admr.*, 18 Ala. 21; *Parsons v. Boyd*, 20 Ala. 112; *Kimball v. Thompson*, 4 Cush. (Mass.) 447; *Hart v. Fitzgerald*, 2 Mass. 509.

² *Frierson v. Frierson*, 21 Ala. 549; *Bell v. Hogan*, 1 Stewart, (Ala.) 536; *Miller v. Eatman*, 11 Ala. 609.

³ *Otis v. Sill*, 8 Bart. 102.

⁴ *Chambers v. Hunt*, 18 N. J. L. 339; *Barry v. Rogers*, 2 Bibb. 314; *Hinchman v. Patterson*, H. R. R. Co., 17 N. J. Eq. 75; *Owings v. Owings*, 1 Har. & Gill. (Md.) 484; *Glover v. Hunnewell*, 6 Pick. 222; *Walker v. Fenner*, 28 Ala. 373.

⁵ *McArthur v. Lane*, 15 Me. 245; *Reinheimer v. Hemingway*, 35 Pa. St. 435; *Demott v. Hagerman*, 8 Cow. 220; *Coryton v. Lithebye*, 2 Saund. 116; *Decker v. Livingston*, 15 John. 479; *Portland Bank v. Stubbs*, 6 Mass. 422; *D'Wolf v. Harris*, 4 Mason C. C. 515; *Eakin v. Eakin*, 63 Ill. 160; *Colton v. Mott*, 15 Wend. 619. Consult *Gilmore v. Wilbur*, 12 Pick. 120; *Pickering v. Pickering*, 11 N. H. 141.

possess him. It is true, also, that one of two joint tenants is owner of the half of the whole, and as against all but his co-tenant would seem to have a better right to the exclusive possession than any stranger; but it must be remembered that his right extends only to half, and not to the whole, and that as against a stranger in possession he has no greater rights to his co-tenant's interest than any other third person. Therefore, when he relies on his title, and not on his prior possession, his title will not avail in action against a stranger. The case of *Schwartz v. Skinner*, 47 Cal. 6, and the dicta in *D' Wolf v. Harris*, 4 Mason, C. C., 515, may be quoted against these views; but the former was decided under a special statute, and the latter is mere *dicta*, and the entire current of authority is the other way.¹

§ 157. **The same; illustrations of the rule.** Where a landlord agreed to receive part of the crop for his rent, to be harvested and delivered to him in the crib, it was levied on as the property of the tenant while in the field. *Held*, the landlord could not sustain replevin for his share prior to a division.² So where a party purchased land, and being unable to pay for it agreed to deliver a part of the crop for the use, but afterwards refused to do so, and was hauling the grain to the market and storing it in his own name and the names of other parties; the landlord brought a bill to restrain all the parties, which was held the proper remedy in such case. The plaintiff could not maintain replevin for an undivided portion of the corn; his only remedy was held by bill in equity.³

¹ *Chambers v. Hunt*, 18 N. J. L. 339; *Hunt v. Chambers*, 1 Zab. (N. J.) 623; *Barnes v. Barlett*, 15 Pick. 75; *M'Eldery v. Flannagan*, 1 Har. & G. (Md.) 308; *Russell v. Allen*, 3 Kern, (N. Y.) 178; *Wilson v. Gray*, 8 Watts, 35; *Deacon v. Powers*, 57 Ind. 489. Where the property is admitted to be in the plaintiff by the pleading, and the joint ownership is not made a ground of defense, the rule cannot be enforced — *Tell v. Beyer*, 38 N. Y. 161 — and when one joint tenant sells a stranger the right to cut timber off the common property, the other cannot succeed in replevin for the timber after it is cut. *Alford v. Bradeen*, 1 Nev. 228.

² *Sargent v. Courier*, 66 Ill. 245. The same rule was applied in Indiana. *Lacy v. Weaver*, 49 Ind. 376; *Williams v. Smith*, 7 Ind. 559; *Lindley v. Kelley*, 42 Ind. 294.

³ *Parker v. Garrison*, 61 Ill. 251.

§ 158. **Landlord reserving a share of the crop cannot sustain replevin until his share is set apart.** Where a tenant agrees to deliver a share of the crop for his rent the landlord cannot sustain replevin for any portion until his share has been ascertained and set apart or separated from the tenant's.¹ But when the grain was harvested and put in the barn, and the tenant divided and took away his share, leaving the landlord's, it was held a sufficient division of the crops to enable the latter to maintain replevin for his share.²

§ 159. **Death of one partner, who entitled to the partnership property.** On the death of one of two partners the partnership is dissolved. In some of the States the survivor is entitled to retain possession of the partnership effects; and in such case, upon conforming to such regulations as the statutes provide concerning an account, he is entitled to the possession of all the chattels belonging to the firm, and may bring replevin for them. In other States the property of the deceased member of a firm goes to his administrator,³ and in such case the surviving partner having only a joint interest cannot, upon that title, sustain replevin.

§ 160. **The same. Joint tenancy, how pleaded.** Where the plaintiff fails to establish his right to the possession exclusively in himself, he cannot succeed. The joint tenancy of others may be pleaded in abatement or may be taken advantage of on the trial, under a plea in bar setting up that fact.⁴

§ 161. **By agreement of all joint owners, the right to possession may be in one.** When by the agreement of all the joint owners, the right to the possession is vested exclusively in one of them, he may replevy with success even against his

¹ *Lacy v. Weaver*, 49 Ind. 373; *Williams v. Smith*, 7 Ind. 559; *Chissom v. Hawkins*, 11 Ind. 316; *Fowler v. Hawkins*, 17 Ind. 211; *Sargent v. Courier*, 66 Ill. 245; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 Ill. 372; *Daniels v. Brown*, 34 N. H. 454.

² *Burns v. Cooper*, 31 Pa. St. 429.

³ *Putnam v. Parker*, 55 Me. 236.

⁴ *Reinheimer v. Hemingway*, 35 Pa. St. 435; *Cullum v. Bevans*, 6 Har. & J. (Md.) 469; *Harrison v. M'Intosh*, 1 John. 380; *Chambers v. Hunt*, 3 Har. (18 N. J.) 339; *Marsh v. Pier*, 4 Rawle. 273. Consult *D'Wolf v. Harris*, 4 Mason, C. C. 515; *Addison v. Overend*, 6 Term. R. 357, 766.

co-tenants.¹ Where the property was the equipment of a whaling vessel, and the master had the exclusive right to possession during the voyage, but after the return the general agent, whose right and duty it was, under the contract with all the owners, to take charge of the stores and dispose of them, had the right to possession, the latter could sustain replevin against anyone who should interfere with his possession.² When the partnership was for the manufacture of saddles, and one partner was to furnish all the stock and the other to do the work, the partner owning the stock might replevy it from an officer who seized it on process against the working partner before any work was done on it.³

§ 162. **The severance of the joint tenancy by agreement.** The severance of the joint tenancy so that any allotted part is set off to either, will vest in him such a title as will enable him to sustain replevin. So when a certain part of a cargo was sold by consent of all the joint tenants, the purchaser was entitled to bring replevin.⁴

§ 163. **Severance by the act of one joint tenant.** The question sometimes arises how far a joint tenancy in chattels can be severed by the act of one of the joint owners. In a case where the parties owned a number of bags of coffee, not in any way distinguished by marks or otherwise, the court said each one might have taken the number of bags which belonged to him by his own selection.⁵ Where the property, consisting of grain, raised and owned jointly by two, was put into two cribs, containing equal portions, and each tenant had a key to one of the cribs with the right to feed therefrom, there was not such a separation as would justify an action on the part of either against the other,⁶ there being no formal settlement or division. But where a party purchases goods in bulk, and the separation depends on his own selection, he may, by making his selection, have the absolute property in

¹ *Newton v. Gardner*, 24 Wis. 232; *Corbett v. Lewis*, 53 Pa. St. 331.

² *Rich v. Ryder*, 105 Mass. 307.

³ *Boynton v. Page*, 13 Wend. 425.

⁴ *Seldon v. Hickock*, 2 (Cain's Ca.) N. Y. Term R. 166.

⁵ *Gardner v. Dutch*, 9 Mass. 427. But, see editor's note to this case.

⁶ *Usry v. Rainwater*, 40 Geo. 323.

the part so selected by him.¹ And where the joint property is of such a nature that one may take his share without in any way affecting the value of that remaining, cases can be found which say he may do so without consent of his co-tenants.²

§ 164. **Purchaser of a joint tenant's interest at sheriff's sale.** Where the interest of one partner is sold by the sheriff or executor, the purchaser becomes a *quasi* tenant in common with the other partners so far as to entitle him to an account, but not to the exclusive possession of any part of the property, and replevin by such purchaser would fail.³

§ 165. **Sale by one partner of his interest in goods.** When one partner sells his interest to a stranger, the purchaser cannot sustain replevin on the refusal of the other partner to admit him into partnership. The sale was a dissolution of the partnership, and the continuing member was not compelled to admit the purchaser into partnership with him.⁴

§ 166 **An officer with process against one member of a firm may seize all the partnership goods.** The rule is settled that a sheriff with process against one member of a firm, may levy upon the interest of that member in partnership property, and may sell such partner's interest.⁵ Partnership accounts cannot be settled in replevin.⁶

§ 167. **The same.** Where there is a judgment against one partner and an execution issues thereon, the officer cannot seize a part of the partnership property; he must seize the entire property subject to levy and must take and retain the custody thereof. This rule seems to arise from the necessities of the case. The officer cannot in any other way take possession of the property subject to levy and sale. And while the law does not permit the sale of more than the interest of the party against whom the execution runs, the interests of the other partner must so far yield as to permit the possession

¹ Clark v. Griffiths, 24 N. Y. 596; McLaughlin v. Piatti, 27 Cal. 452.

² Forbes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 Barb. 334.

³ Reinheimer v. Hemingway, 35 Pa. St. 435.

⁴ Reece v. Hoyt, 4 Port. (Ind.) 169.

⁵ Waldman v. Broder, 10 Cal. 378; Scrugham v. Carter, 12 Wend. 131.

⁶ Chandler v. Lincoln, 52 Ill. 76.

of the whole long enough for the sale of the undivided interest of the execution debtor who is part owner, and the other partner cannot sustain replevin.¹ The interest of a partner is not to be regarded as a specific share in the goods owned by them, but rather an interest in the surplus after the firm debts are paid.²

¹ *Branch v. Wiseman*, 51 Ind. 1; *Ladd v. Billings*, 15 Mass. 15; *Haydon v. Haydon*, 1 Salk. 392; *Shaver v. White*, 6 Munford, (Va.) 110; *Mersereau v. Norton*, 15 Johns. 179; *Skipp v. Harwood*, 2 Swanst. 586; *Johnson v. Evans*, 7 Man. & G. 240; *Whitney v. Ladd*, 10 Vt. 165; *Remington v. Cady*, 10 Conn. 44; *Lawrence v. Burnham*, 4 Nev. 361; *Rapp v. Vogel*, 45 Mo. 524; *Goll v. Hinton*, 8 Abb. Pr. 120; *James v. Stratton*, 32 Ill. 202; *White v. Jones*, 38 Ill. 159; *Sanders v. Young*, 31 Miss. 111; *Bernal v. Hovious*, 17 Cal. 541; *Hardy v. Donellan*, 33 Ind. 501; *Moore v. Sample*, 3 Ala. 319. See *Jones v. Thompson*, 12 Cal. 191; *Walsh v. Adams*, 3 Denio, 125. But, compare these cases with *Treadwell v. Brown*, 43 N. H. 290; *Gibson v. Stevens*, 7 N. H. 353; *Morrison v. Blodgett*, 8 N. H. 238; *Newman v. Bean*, 21 N. H. 93; *Crockett v. Crain*, 33 N. H. 548.

² *Garvin v. Paul*, 47 N. H. 163.

CHAPTER VII.

DESCRIPTION, IDENTITY OF THE GOODS.

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§ 168 **Plaintiff must prove himself to be the owner of the identical property sued for.** It is an inflexible rule in replevin that the plaintiff must show himself to be the owner of the identical articles for which the suit is brought, or that

he is entitled to their immediate possession. It is not sufficient that he own goods of like description and value; he must show that the identical property described in the writ and pleadings is his, and also that the articles can be distinguished and separated from all others, or he will fail in his action.¹ The few exceptions to this rule are in cases where identification is impossible and of no importance. They will be noted hereafter.

§ 169. **The writ must describe the property particularly.** The writ must specify the particular property to be replevied.² Thus, when the property was described as "Buckwheat, valued at three hundred dollars," or "Sweet potatoes valued at thirty-nine dollars," or "About ten acres of potatoes," or "Four acres of squash," there was a failure to identify the property, or to furnish any means by which it could be ascertained, and the writ failed.³ But where the sheriff levied on coin which was by consent and for convenience exchanged for bank bills, this alteration was held not to prejudice the rights of a stranger to the proceeding who claimed to own the money and sought to recover the bills in replevin.⁴

§ 170. **The property must be capable of delivery.** The property must be *in esse*, and in such form of existence that it may be the subject of delivery. Where a colt, the expected progeny of a mare owned by another, was the subject of dispute, replevin was not the proper form of action.⁵ Neither

¹ 3 Bla. Com. 145; 1 Ch. Pleadings, 163; *Hnd v. West*, 7 Cow. 752; *Snyder v. Vaux*, 2 Rawle, (Pa.) 423; *Ames v. Miss. Boom Co.*, 8 Minn. 470.

² *Snedeker v. Quick*, (6 Halst.) 11 N. J. 179; *Pope v. Tillman*, 7 Taunt. 642; *Davis v. Easley*, 13 Ill. 192.

³ *Welch v. Smith*, 45 Cal. 230. Reasonable certainty must be used in the description. *Root v. Woodruff*, 6 Hill, (N. Y.) 418; *Snyder v. Vaux*, 2 Rawle, 427; *Kaufmann v. Schilling*, 58 Mo. 219; *Gray v. Parker*, 38 Mo. 160; *Ryder v. Hathaway*, 21 Pick. 305; *Hart v. Fitzgerald*, 2 Mass. 509; *Carlton v. Davis*, 8 Allen, (Mass.) 94; *Low v. Martin*, 18 Ill. 286; *Reese v. Harris*, 27 Ala. 306; *Stevens v. Osman*, 1 Mich. 92; *Farwell v. Fox*, 18 Mich. 169; *Stanchfield v. Palmer*, 4 G. Greene, (Iowa,) 25; *Brown v. Sax*, 7 Cow. 95; *Heard v. James*, 49 Miss. 245; *Root v. Woodruff*, 6 Hill, 424; *Smith v. Sanborn*, 6 Gray, 134; *Dodge v. Brown*, 22 Mich. 449.

⁴ *St. Louis & Alton R. R. v. Castello*, 28 Mo. 380.

⁵ *McCarty v. Blevins*, 5 Yerger, (Tenn.) 196.

would the action lie for a slave who was dead at the time of the commencement of the suit,¹ or for property destroyed before the suit was begun.² In these and similar cases, where the property is not in existence at the time the suit is commenced, there can be no delivery, and for that reason replevin is not the proper form of action.³ Some novel and intricate questions will arise under this head touching the separation of goods purchased from bulk, the mixture or confusion of goods belonging to different owners, the change of form which goods may undergo in the hands of the defendant, the effect which these conditions may have upon the rights of the several parties claimant, as well as in relation to the description of the goods.

§ 171. **Strictness of the rule in regard to description and the reasons for it.** An exceedingly strict practice prevails as to the description of the chattels sued for. The rule is, that the property must be particularly described, not simply by the number and class of articles, but that each article, where this is practicable, be so described that it can be identified and delivered by reference to the description only. Thus, where the property is described as "six oxen," it is not sufficient. If they be called "six red oxen," this would confine the selection to a class — that is, to "red oxen"; but it would still be uncertain which "red oxen" were intended. To obviate this, the size, age, marks or spots, if any, and the place where they are, should be stated, with any other particulars that would lead to their identification,⁴ the object being not only to apprise the defendant what property the plaintiff will assert title to, but to indicate to the officer the property which he is to

¹ Caldwell v. Fenwick, 2 Dana, (Ky.) 333.

² Burr v. Daugherty, 21 Ark. 559.

³ Lindsey v. Perry, 1 Ala. (N. S.) 203; Chissom v. Hawkins, 11 Ind. 318. See Otis v. Sill, 8 Barb. 102, for an interesting case of sale of property not *in esse*.

⁴ Farwell v. Fox, 18 Mich. 169; Stevens v. Osman, 1 Mich. 92; Wilson v. Gray, 8 Watts, (Pa.) 39. In Indiana, a description, "one white shoat, of the value of fourteen dollars," was held sufficient. Onstatt v. Ream, 30 Ind. 259. But this evidently falls short of the exactness usually required. Compare Dowell v. Richardson, 10 Ind. 573.

seize and deliver under the writ, so that there may be no doubt or uncertainty;¹ for example, "fifteen hundred pounds of cotton seed" was held sufficient to describe the substance and quantity; but something further should have been added, as that it was in such a house or place, to enable the officer to find and identify it from the writ.²

§ 172. *The same.* A description good in trespass or trover not sufficient in replevin. A description which is perfectly good in detinue, trover or trespass is not necessarily good in replevin. The distinction is, that in those actions the goods themselves are not in dispute, simply their value, while in replevin the identity of the property often forms the chief question in controversy; and, while it would be competent for a plaintiff to recover the value of a "red ox" in trover, yet that description would not be sufficient in an action of replevin.³

§ 173. *The same.* Illustrations of the rule. "Divers goods and chattels;"⁴ or, "a quantity of corn, about two hundred bushels;"⁵ or, "a lot of goods in the store of A.,"⁶ would not be sufficient description in replevin, though perhaps they would be in trover. In an action of trover for "forty ounces of mace, nutmegs and cloves," without saying how much of either, the description was held sufficient, but would not have been in replevin.⁷ So, "fourteen skimmers and ladles, and three pots," is faulty in replevin, but might not be in trespass or trover;⁸ but a box of skins and furs marked "J. Windor, Logansport, Ind.," is sufficient.⁹ And the general rule is, that

¹ *Ruch v. Morris*, 28 Pa. St. 245.

² *Hill v. Robinson*, 16 Ark. 90.

³ *Kinaston v. Moor*, Cro. Car. 89; *Farwell v. Fox*, 18 Mich. 169; *Taylor v. Wells*, 1 Mod. 46; *Gordon v. Hostetter*, 37 N. Y. 103; *Hartford v. Jones*, 2 Salk. 654. The declaration ought to be accurate in setting up the number, kind and description of the cattle. *Bull N. P.* 52; *Neiler v. Kelley*, 69 Pa. St., 407; *Wood v. Davis*, 1 Mod. 290.

⁴ *Pope v. Tillman*, 7 Taunt. 642; *Warner v. Aughenbaugh*, 15 S. & R. (Pa.) 9.

⁵ *Stevens v. Osman*, 1 Mich. 92.

⁶ *Edgerly v. Emerson*, 3 Foster, (23 N. H.) 555.

⁷ *Hartford v. Jones*, 2 Salk. 651.

⁸ *Bern v. Mattaire*, Ca. Temp. H. 119.

⁹ *Minchrod v. Windoes*, 29 Ind. 288.

a description which will enable the sheriff, aided by inquiries, to identify the property, will be sufficient to support the action.¹

§ 174. **The same.** "All articles of household furniture now contained in said house, (describing it,) consisting of carpets, chairs," etc.,² is good. So, of "five hundred and seventy-two three-year old Texas cattle, now in possession of the party designated, in Morris Co., Kansas";³ or, "all the stock, tools, and chattels belonging to the mortgageor, in and about the wheelwright shop now occupied by him."⁴ A description which is sufficient to pass property is usually sufficient in replevin.⁵

§ 175. **When the sufficiency of description is a question for the jury.** Where the identity of the property or the correctness of the description becomes a question, it is for the jury to determine from the evidence. Suppose the description ran, "A black horse, now in the stable of A." This would doubtless be sufficient; but suppose the evidence showed there were two black horses in that stable. It would then be a proper question for the jury to determine whether or not the plaintiff was entitled to the horse delivered.⁶ And this rule would apply in all cases where the question is as to whether a given description applied to or covered the property in dispute; but if the question was as to the sufficiency of a given description to pass title or sustain the action, it would be for the court, and not the jury, to decide.

§ 176. **Synonymous descriptions. Illustrations of, and when allowable.** The term heifer may be used to describe a cow. "I know of no authority," says GRAY, J.,⁷ "for considering 'heifer' to be a mis-description of a cow, except in

¹ *More v. Clipsam*, Allen, 33; *Same v. Same*, Sty. 71; *Smith v. McLean*, 24 Iowa, 324; *Lawrence v. Coates*, 7 Ohio St. 194; *Buckley v. Buckley*, 9 Nev. 379.

² *Beach v. Derby*, 19 Ill. 619.

³ *Brown v. Holmes*, 13 Kan. 492.

⁴ *Harding v. Coburn*, 12 Met. 333; *Morse v. Pike*, 15 N. H. 529; *Burdett v. Hunt*, 25 Me. 419; *Wolfe v. Dorr*, 24 Me. 104; *Winslow v. Merch. Ins. Co.*, 4 Met. 306.

⁵ *City of Fort Dodge v. Moore*, 37 Iowa, 388.

⁶ *Vennum v. Thompson*, 38 Ill. 144.

⁷ *Pomeroy v. Trimper*, 8 Allen, (Mass.) 403.

penal statutes.”¹ Upon the authority of these cases, it may be proper to describe a hog as a pig, or *vice versa*; colt may perhaps be used for horse. But the safer way is to make the description accurate, and in the terms which are in common use where the suit is brought, or in the trade or business with which it is connected.

§ 177. **The rule as to certainty of description.** This action does not lie for money, unless it be in a bag or package, or in some way distinguished from all other money;² but it lies for money or jewels in a bag,³ or bonds which are numbered and can be identified.⁴ When coin belonging to several different owners was in a safe, and the sheriff, with a writ of attachment, separated eighteen hundred dollars from the remainder, and put it in a bag, and the plaintiff brought suit in replevin to recover the money from the sheriff, the court regarded the separation as sufficient to enable him to sustain the action.⁵

§ 178. **The same.** The plaintiff alleged that he was induced by fraud to buy a book, and to pay one thousand dollars, by a draft, which was delivered to a banker, and by him collected and placed to the credit of the seller. Plaintiff sued for one thousand dollars gold. On leave given to amend, he induced the defendant, the banker, to put nine hundred and fifty dollars in coin in a bag, and brought replevin for it. *Held*, that he could not recover; that he showed no title to the specific property; that the banker could not make it the

¹ H. P. C., 183; *Carruth v. Grassie*, 11 Gray, 211; *Freeman v. Carpenter*, 10 Vt. 434. A man brought replevin for a “heifer,” and in his writ of second deliverance he called it a “cow.” FITZHERBERT said the writ was good. It was a heifer; it may be a cow now. Y. B. 26 H. 8, 6, 27.

² *Holiday v. Hicks*, Cro. Eliz. 661; *Draycot v. Piot*, Cro. Eliz. 818; *Rapalje v. Emory*, 2 Dall. 51. “If I bail twenty pounds to one to keep for my use, if the money were not contained in a bag, coffer or box, detainue doth not lie”—*Core's Case*, Dyer, 22 b; 6 E. 4 11; 7 H. 4 14; *Banks v. Whetstone*, Moore, 394—but trover would lie. *Hall v. Dean*, Cro. Eliz. 841. As to bank bills, see *Dows v. Bignall*, Lator's Suplmt. 408; *Warner v. Sauk Co. Bank*, 20 Wis. 492; *Jackson v. Anderson*, 4 Taunt. 24; *Skidmore v. Taylor*, 29 Cal. 619; *Ames v. Miss. Boom Co.*, 8 Minn. 472.

³ Bull N. P. 32.

⁴ *Sager v. Blain*, 44 Hand. (N. Y.) 448.

⁵ *Griffith v. Bogardus*, 14 Cal. 410. The distinction between money and specific property is stated by Lord MANSFIELD in *Clarke v. Shee*, 1 Cowp. R. 200.

money of his depositor, so as to subject it to the replevin suit, by putting it in a bag, without the depositor's consent.¹

§ 179. Description of numerous articles, as the goods in a store. Where the articles are numerous, and a separate description of each would not aid in their identity, a more general method, if it be definite, may be employed. Thus: "A certain storehouse, warehouse, and the goods therein contained, being the store in Council Bluffs, in said State and county, known and designated as the store of your petitioner," is sufficient for the store and contents.² So, when a chattel mortgage enumerates sundry articles specifically, and also includes "all other articles of personal property in and about the mortgageor's shop," the general description will pass all.³

§ 180. Descriptions which may refer to kind or quantity. It may be a question, at times, whether the words used in the writ are employed to designate the kind and description of the article, or the quantity. Thus, "barrels of lime" may mean lime in barrels, or it may refer to the quantity in bulk; "barrels of flour" may be a proper description of flour in bags, because the common usage of the trade in many parts of the country warrants it, but the better practice is to avoid any description which may be ambiguous. Where the writ directed the sheriff to take "barrels of No. 1 mackerel," and the return showed that he took barrels and half barrels, the defendant moved for a return of the half barrels, upon the ground that they were not described in the writ; whereupon plaintiff proved that when the writ was being served, the defendant agreed that two half barrels should be taken for a whole one, and the court held that "the term 'barrel' should be regarded as a designation of quantity, irrespective of the mode in which it was packed, or the particular vessels in which it was contained."⁴

¹ Pilkington v. Trigg, 28 Mo. 98.

² Ellsworth v. Henshall, 4 G. Greene, (Ia.) 418. To invoice a stock would be tedious, expensive, and sometimes impossible; and the courts have held that when the store is identified, the "contents" are sufficiently ascertained by such description. Litchman v. Potter, 116 Mass. 373.

³ Harding v. Coburn, 12 Met. 333.

⁴ Gardner v. Lane, 9 Allen, (Mass.) 493.

§ 181. A quantity described as "about" so much. On a writ of replevin for "about four hundred tons bog ore," the sheriff was not authorized to deliver seven hundred and twenty tons. Such a writ was held defective, and that the sheriff might have refused to execute it. If the ore had been identified as such a lot or such a pile, describing it, the number of tons might have been regarded as surplusage.¹

§ 182. The proof as to description, must correspond with the writ. The proof must correspond to the writ and declaration as to description of the property; any material variance will defeat the action. Where the suit was for two "bay horses," and the proof showed one of them to be a sorrel, the variance was fatal.² In trover for "a slave named John," the proof showed conversion of a slave but not that his name was John; *held*, the plaintiff could not recover.³ When a note was described in the declaration as "a note for \$180," and the proof was a note for \$300; *held*, a fatal variance.⁴ But an omission of some words in the description which does not render the writ so defective that the property cannot be identified, such as the omission of the word "feet," in describing timber, does not render the writ void. The sheriff may perhaps refuse to serve it unless it be amended, but if he does, by taking the right property, the court will have jurisdiction.⁵

§ 183. Exact quantity need not be given where the particular property is indicated. It is not essential that exact quantities be stated when the description is otherwise certain; as for example, "a pile of wheat," or "a quantity of barrels of pork," in a certain warehouse, would be good without mentioning the number of bushels or barrels; and a description sufficient to pass title will be good in this action.⁶

§ 184. Writ of return and verdict may follow declaration, as to description. The description in the writ of return is

¹ DeWitt v. Morris, 13 Wend. 495.

² Taylor v. Riddle, 35 Ill. 567.

³ Ward v. Smith, 8 Ired. (N. C.) 296.

⁴ Bissel v. Drake, 19 Johns. 66.

⁵ Nolty v. The State, 17 Wis. 668.

⁶ Scudder v. Worster, 11 Cush. 573; Groat v. Gile, 61 N. Y. 431; Susquehanna Boom Co. v. Finney, 58 Pa. St. 200.

sufficient, if it describe the property the same as the declaration. If there is a misdescription the plaintiff is responsible and must suffer the consequences.¹ Where property was specifically described in the complaint, and in the verdict was referred to as "said property," it was sufficient.²

§ 185. **When objections to the insufficiency of description must be taken.** When the defendant desires to object to the description for uncertainty, he must do so at the first available opportunity; if he omit to do so and plead to the merits, or give bond under the statute, as owner, to retain the property, he will be considered as having waived such defects.³ So a declaration for a "lot of sundries," is bad and would undeniably have been so held; but, after the defendant has pleaded that they are his, and has gone to trial, he cannot ask the court to reverse the judgment because the description is uncertain. If he had really labored under this want of knowledge, he had the means to protect himself, before pleading.⁴ The reason of this rule is, that the objection is in the nature of a dilatory motion, and the rules which apply to such motions must generally govern here.

§ 186. **Replevin does not lie for goods sold, unless they are in some way separated from others or identified.** One of the familiar rules of the law concerning sales, is, that a simple bargain is not sufficient to transfer title to chattels unless it be accompanied by some actual or symbolic delivery, or by some separation of the chattels sold, to distinguish them from others.⁵ Thus, a contract to sell and deliver a certain number and kind of hogs belonging to the seller, at a particular time and place, will not vest sufficient title in the purchaser to sustain replevin,⁶ for the reason that where anything remains to be done to complete the contract of sale, the title does not pass. The contract must be completed before it will transfer

¹ *Lammers v. Myers*, 59 Ill. 216.

² *Anderson v. Lane*, 32 Ill. 103.

³ *Ruch v. Morris*, 28 Pa. St. 245.

⁴ *Warner v. Aughenbaugh*, 15 S. & R. (Pa.) 9.

⁵ *Hutchinson v. Hunter*, 7 Barr. (Pa. St.) 140; *White v. Wilks*, 5 Taunt. 176; *Stevens v. Eno*, 10 Barb. 95; *Stephens v. Santee*, 49 N. Y. 35.

⁶ *Lester v. East*, 49 Ind. 588. See *Suggetts, Admr. v. Cason*, 26 Mo. 221.

the title. Where a party agreed to deliver hedge plants and to take his pay in land, and learning that the title to the land was defective, refused to deliver, yet notified the party he could have the plants on paying for them, the purchaser took no such title as would sustain replevin.¹ But where one bought and paid for a quantity of corn out of the seller's lot, and the vendor afterwards sold the whole, the fact that the corn was not measured or set apart, will not defeat an action for money had and received.²

§ 187. **The same.** If the owner of a large quantity of a particular kind of merchandise sells part of it, property in that part does not pass unless it be in some way set apart or distinguished from the rest. Consequently, the purchaser cannot maintain replevin, even though he has paid full value for it.³ But if the property is so indicated by description that it may be separated, it will be sufficient to pass title upon which to base the action.⁴ Where the action was for the price of bark, sold at a stipulated price per ton, it was agreed that it should be weighed by two persons, each party to name one. Part of the bark was weighed and delivered, but the balance was injured by a storm, and the purchaser refused to take it. The court held that, as the bark was to be weighed before delivery, the property remained with the seller, and the loss fell on him.⁵

§ 188. **The same.** Defendant agreed to make three wagons for the plaintiff; but as the contract did not relate to any particular wagons, it would not sustain replevin by the purchaser.⁶ Neither would an agreement to sell entitle the purchaser to an action for possession unless the particular property was agreed

¹ *Barrett v. Turner*, 2 Neb. 174. See *Sutro v. Hoile*, 2 Neb. 186; *Bell v. Farrar*, 41 Ill. 403; *Tyler v. Strang*, 21 Barb. 198; *Dixon v. Hancock*, 4 Cush. 96.

² *Long v. Spruill*, 7 Jones, (N. C.) 96.

³ *Crofoot v. Bennett*, 2 N. Y. 258; *Scudder v. Worster*, 11 Cush. 573.

⁴ *Ropes v. Lane*, 9 Allen, (Mass.) 510; *Groat v. Gile*, 51 N. Y. 431.

⁵ *Simmonds v. Swift*, 5 B. & C. 857.

⁶ *Upkike v. Henry*, 14 Ill. 378; *Halterline v. Rice*, 62 Barb. 593. See, also, *Pettengill v. Merrill*, 47 Me. 109.

upon and sold.¹ So, of a contract to sell two hundred tons pig iron. Vendors were daily making large quantities. It was piled up as they saw fit; not marked, nor did the purchaser ever see it. *Held*, that he could not maintain replevin against the sheriff, who levied on it by virtue of an execution against the vendor.²

§ 189. **The same.** A party bought and paid for two thousand rolls of paper. He left one thousand rolls in the store, not separated, to remain until he should call for it. The seller soon after made an assignment for the benefit of his creditors, and the purchaser replevied the paper from the assignee, who thereupon brought trespass against the plaintiff in replevin, and the sheriff. GIBSON, C. J., said: "Had the pieces been separated from the rest, a small excess would not have vitiated the sale; but there is no evidence that the bargain regarded any gross lot, or any particular pieces. The witness testified that the purchaser was to have his paper out of the cellar, but that he had not selected it, nor had any particular rolls been set apart for him. The vendors might have delivered him any other paper in the store." *Held*, that trespass lay by the assignee.³

§ 190. **The same.** Selection by the purchaser; when sufficient. When the action was for one billiard table, the defendants justified, and claimed a return. It appears that the defendants sold four billiard tables, and took a chattel mortgage. At the foot of the bill of sale was an agreement, that after three hundred dollars should be paid, they would give a receipt in full for one table, and so continue, as payments were made, until all were paid for. They afterwards received the amount and executed a receipt in full for one table. The purchaser afterwards sold all his title to the four tables. The subsequent payments not being made, the defendants, under their chattel mortgage, seized all four of the tables and sold them. The assignor of the purchases then demanded one of the tables,

¹ Suggett's Admr. v. Cason, 26 Mo. 224.

² First Nat. Bank of Marquette v. Crowley, 24 Mich. 498. See, also, Scott v. King, 13 Ind. 203; Cloud v. Moorman, 18 Ind. 40.

³ Golder v. Ogden, 15 Pa. St. 528.

and afterwards brought this suit. The court held, in substance, that the defendant had, under the chattel mortgage, a right to three of the tables, but not to four. That upon the execution of the receipt in full for one table, nothing remained but to select or designate that particular table out of the four. Until this was done they could not claim any one; but, as they took the four tables from the room where they were stored, they obviously must have taken them one at a time. In legal effect, they made their selection of their three, when they had removed three, and that they had no right to take the fourth. That the plaintiff's right vested absolutely in the fourth table, when the defendants had exercised their right in selecting three, and they must be regarded in legal effect as having selected the first three which they took.¹

§ 191. *The same.* Where the defendants agreed to sell all the rye they had, to be delivered at a certain warehouse, within ten days, and to take a note at three months, the vendor delivered the grain at the warehouse, where it was stored, subject to his own order. The note was not tendered within the time agreed upon, but a day or two thereafter the purchaser sent a carrier with an order for the grain. The vendor refused to deliver on the order, but delivered it to the carrier, to be carried and delivered on his own account. While in the charge of the carrier, it was replevied by the purchaser under the contract. *Held*, that there was no delivery of the grain under the contract. If the delivery to the carrier had been for the use of the purchaser, it would have been different.²

§ 192. *Property acquired by verbal gift, without delivery.* Questions concerning the title acquired by verbal gift of personal property, with or without actual delivery, frequently arise. The general rule may be stated, that a verbal gift, without being accompanied by delivery, will not vest the donee with the title. But when there has been an actual manual delivery, or where the article is bulky and incapable

¹ *Clark v. Griffith*, 24 N. Y. 596.

² *Lester v. McDowell*, 18 Pa. St. 94. See, also, *Bradley v. Michael*, 1 Carter, (Ind.) 552.

of actual manual delivery, a constructive delivery will pass the title to the donee, who may maintain an action as the owner.¹

§ 193. **The general rule applicable in these cases.** A full discussion of these questions is more particularly appropriate to a work on contracts, or sales. As affecting the action of replevin, the rule gathered from the cases before mentioned, and sustained by the authorities, is, that a sale and agreement to deliver property, without any actual or symbolic delivery, or some separation or indication of the property sold, to distinguish it from other similar property, will not support replevin by the purchaser;² but any separation or distinguishing of the goods from others, so that they can be identified as the particular lot sold, will be sufficient to complete an otherwise valid sale, so as to pass the title and enable the vendee to maintain replevin. When barrels of mackerel were inspected and marked "No. 1," "No. 2," etc., a sale of all marked No. 1 will pass the title to such as are so marked, without any other separation.³

§ 194. **Symbolic delivery.** Delivery of a bill of lading by the owner of the goods shipped, with the intention to transfer title to them, or as security for money advanced, is a symbolic delivery of the goods shipped under it, and vests in a party advancing money thereon a right to recover the property in replevin.⁴ Such a transfer, however, is not absolute, but open to explanation.⁵ Unexplained, it amounts to a *prima facie* transfer of the goods. When, however, the bill of lading is accompanied by a draft, it must be understood to mean that the consignees take the property subject to the payment of the draft,⁶ and the fact that the consignor was indebted to them on

¹ Consult *Hanson v. Millitt*, 55 Me. 184; *Reed v. Spaulding*, 42 N. H. 114; *Carswell v. Ware*, 30 Geo. 267; *Kidder v. Kidder*, 33 Pa. St. 268; *Hunter v. Hunter*, 19 Barb. 631; *Woodruff v. Cook*, 25 Barb. 505.

² *Barrett v. Turner*, 2 Neb. 172; *Lester v. East*, 49 Ind. 588; *Straus v. Ross*, 25 Ind. 300. See *Hodgkins v. Dennett*, 55 Me. 559; *Winslow v. Leonard*, 24 Pa. St. 14.

³ *Ropes v. Lane*, 9 Allen, (Mass.) 510.

⁴ *Nat. Bank G. Bay v. Dearborn*, 115 Mass. 219.

⁵ *Pratt v. Parkman*, 24 Pick. 42.

⁶ *First Nat. Bank v. Crocker*, 111 Mass. 163.

overdrafts would not alter the case. When in such case the consignees obtained possession of the goods without payment of the draft, the consignors could sustain trover or replevin for their recovery.

§ 195. **Goods distinguished by marks, or by separation.** Sale of bales distinguished by marks and numbers, then lying in vendor's warehouse, to remain rent free, at buyer's option, was held to be a sufficient identification.¹ So, where one contracted, with the owner of timber lands, for the right to make staves at a certain rate per thousand, the title passed as soon as the staves were completed, and the maker was allowed to bring replevin for those which the owner had seized before they were counted or paid for.²

¹ *Hotchkiss v. Hunt*, 49 Me. 213. See, also, *Fifth Nat. Bank Chicago v. Bayley*, 115 Mass. 229; *Carter v. Willard*, 19 Pick. 1; *Gibson v. Stevens*, 8 How. (U. S.) 384; *Nat. Bank Cairo v. Crocker*, 111 Mass. 163. *Fettyplace v. Dutch*, 13 Pick. 388, is an interesting case of conflicting liens and symbolic delivery. *Morrison v. Dingley*, 63 Me. 553; *May v. Hoaglan*, 9 Bush. (Ky.) 171.

² *Mohn v. Stoner*, 14 Iowa, 115.

CHAPTER VIII.

CONFUSION OF GOODS OF DIFFERENT OWNERS—CHANGE OF FORM.

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§ 196. **Mixture or confusion of goods belonging to different owners.** It frequently happens that property of similar kinds belonging to different owners become mixed, by accident or

design, and as a result of such mixture neither owner can distinguish what portion of the whole, or which articles comprised in the mass belong to him.

§ 197. **Willful mixture. All belongs to the innocent party.** "If one willfully intermixes his money, corn, or hay, with that of another, without his approbation or knowledge, or casts his gold in like manner into another's melting pot, our law, to guard against fraud, allows no remedy in such case, but gives the entire property, without account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his consent. But, if the mixture be by consent, then both have a common interest in proportion to their respective shares."¹

§ 198. **The same. Illustrations of the rule.** Where a person bought a stock of mortgaged drugs and mixed his own with them, the mortgagee still had a right to take his goods. And if in so doing he took some not his own, they being so confounded with his that he could not distinguish them, it would be wrong to charge him in trespass.² The party is allowed to take such articles as he can positively identify, under the idea, that as to such goods, no mixture or confusion has taken place, and the party has lost none of his rights to them.³

§ 199. **The same. Illustrations of the rule.** Where an officer having attached goods, mixed them with other similar goods previously attached by another officer, he loses his special property.⁴ And where a mortgageor carelessly or purposely mingles his unincumbered goods with those mortgaged and sells both, the mortgagee may replevy the whole;⁵ and it is for the purchaser to furnish evidence to distinguish the

¹ 2 Bla. Com. 405. See, also, *Ward v. Æyre*, 2 Bulst. 323; *Root v. Bon-nema*, 22 Wis. 539; *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 John. Ch. R. 62. See *Dodge v. Brown*, 22 Mich. 451; *Low v. Martin*, 18 Ill. 286; *McDowell v. Bissell*, 37 Pa. St. 164; *Sims v. Glazener*, 14 Ala. 699.

² *Fuller v. Paige*, 26 Ill. 359.

³ *Dillingham v. Smith*, 30 Me. 372; *Colwill v. Reeve*, 2 Campb. 575; *Smith v. Morrill*, 56 Me. 566.

⁴ *Gordon v. Jenney*, 16 Mass. 469.

⁵ *Adams v. Wildes*, 107 Mass. 124. Upon this subject, consult Johnson

different articles, and on his failure to do so, the whole may go to the mortgagee.

§ 200. **The same.** When tools belonging to different workmen, A. and B., were mixed, so that it was difficult to distinguish them, and A. sold his tools to C. without specifying them, and B. had the tools removed, and in so doing, some of A.'s were taken; in trespass for such removal, the judgment was for defendant.¹

§ 201. **The same. General principles in such cases.** The principle which seems to govern in such cases, is, that the mixing or confusion is regarded as a wrongful attempt to deprive the owner of the means of identifying his goods. To guard against this wrong, the law leaves the party who has been guilty, without a remedy, and gives the goods without account to him whose rights have been invaded. But this principle is not carried to the extent of revenge or punishment, except in cases where the trespass was willful. The law will not suffer the principle to be carried further than is required for the protection of an innocent party from injury, with as little loss to the other as is consistent with the innocent party's rights.² The further principle is to be gathered from the cases cited, that the fact of mixture or confusion of goods does not change the rights of the respective owners, unless it produce such confusion that the separate property of each cannot be distinguished. The wrongful turning of horses into a pasture with others would not forfeit the horses, though the party might be liable for the trespass. Neither would the mixture of any other goods produce a change in the title nor make the parties joint owners, unless the separation of the different articles became impossible or impracticable.

§ 202. **Changing marks to produce confusion.** If property is marked in a particular way by the owner, and another

v. Neale, 6 Allen, 227; *Ropes v. Lane*, 9 Allen, 502; *Rockwell v. Saunders*, 19 Barb. 473; *Seibert v. M'Henry*, 6 Watts, (Pa.) 301; *Hyde v. Cookson*, 21 Barb. 92; *Barron v. Cobleigh*, 11 N. H. 557.

¹ *Rose v. Gallup*, 33 Conn. 338.

² *Holbrook v. Hyde*, 1 Vt. 286. See *Simmons v. Jenkins*, 76 Ill. 483.

without his consent changes the mark, or marks his own property in a similar manner for the purpose of creating confusion, the law usually gives the whole to the innocent owner; and although he could not sustain replevin for a part of the property unless he could identify it, yet he may in many cases have replevin for the whole. Where plaintiff was the owner of certain logs, marked in a particular manner, and the defendant caused another mark to be put upon them so that they would be marked like his own, the plaintiff was permitted to sustain replevin for the entire lot.¹

§ 203. **Mixture of grain; when each owner may take his share.** When the mixture occurs without wrong, and where from the very nature of the property the different articles are incapable of being distinguished, and where such separation, could it be made, would not be of the least advantage to any one, the just rule and the current authorities is, that each must take his share from the common mass. Thus, when like grain of different owners is mixed, the separation is not only impossible, but the failure to make it cannot injuriously affect either party in the slightest degree. And in all such cases when the mixture has been by consent, or under circumstances in which the mixture would be reasonably expected by both, or when it has been occasioned by accident, or mistake, and without any wrong intent, the law will give to each his just proportion,² for the reason that in such case the mixture does not change the title, nor are the consequences such as follow the mixture of ingredients incapable of separation.³

§ 204. **The same.** When plaintiff delivered barley on contract to sell for cash, and it was put in a warehouse with other

¹ *Wingate v. Smith*, 20 Me. 287; *Jenkins v. Steanka*, 19 Wis. 127; *Willard v. Rice*, 11 Met. 493; *Beach v. Schmultz*, 20 Ill. 185; *Weil v. Silverstone*, 6 Bush. (Ky.) 698; *Thome v. Colton*, 27 Iowa, 427; *Gilman v. Hill*, 36 N. H. 311; *Stephenson v. Little*, 10 Mich. 433; *Seavy v. Dearborn*, 19 N. H. 351; *Ryder v. Hathaway*, 21 Pick. 299.

² *Stephenson v. Little*, 10 Mich. 433; *Buckley v. Buckley*, 9 Nev. 379; *Lupton v. White*, 15 Ves. 432; *Forbes v. Shattuck*, 22 Barb. 568; *Tripp v. Riley*, 15 Barb. 334.

³ Story on Bailments, this title; *Wilson v. Nason*, 4 Bosw. (N. Y.) 155; *Ryder v. Hathaway*, 21 Pick. 298.

barley, but was not paid for according to contract; *held*, in an action for conversion that the plaintiff had a right to the amount of his grain from the common bulk.¹

§ 205. **The same.** The law is well settled that, where property cannot be identified or separated so as to be seized, replevin is not the proper remedy. But in cases like the preceding, where the goods mixed are of the same kind, though not capable of separation by identification, yet if a separation and delivery can be made of the proper quantity without injuriously affecting the remainder, each may claim his share from the general mass, and may employ this action to secure it.²

§ 206. **The same. Rule in Illinois.** In Illinois the rule seems to be that if the mixture was by consent, the parties became tenants in common, and neither could sustain replevin. If by fraud the tenancy in common does not arise, and the innocent may sustain replevin for the whole. A warehouseman received a quantity of corn in store, and mixed it with other corn owned by himself and others, with the consent of the owner, and with the understanding that a like quantity and quality should be delivered to him out of the common mass, the court held that they were tenants in common, and neither could maintain replevin against the other.³ But if the mixture had been made by the wrongful act of the warehouseman, without the owner's consent, it would have been otherwise.⁴

§ 207. **The rule in New York.** In New York, where the wheat of A. and B. was mixed in a bin by consent, it was held to create a tenancy in common.⁵

¹ *Morgan v. Gregg*, 46 Barb. 183; *Bristol v. Burt*, 7 John. 254.

² *Kaufmann v. Schilling*, 53 Mo. 219; *Inglebright v. Hammond*, 19 Ohio, 337; *Ryder v. Hathaway*, 21 Pick. 305. So when wood of two persons became mingled, without the fault of either, each was held entitled to his share. *Moore v. Erie R. R. Co.*, 7 Lans. (N. Y.) 39. Where a warehouseman gave a receipt for wheat that was never delivered to him, the holder of the receipt could not set up a claim to a portion of the wheat as against owners that actually put in. *Jackson v. Hale*, 14 How. (U. S.) 525.

³ *Low v. Martin*, 18 Ill. 236. See *Parker v. Garrison*, 61 Ill. 252.

⁴ *Warner v. Cushman*, 31 Ill. 283.

⁵ *Nowlen v. Colt*, 6 Hill, 461. When the property of several owners is in its nature severable (like corn, wheat, etc.,) without injury to the mass or to the interest of the other owners, one may appropriate his share if it can be

§ 208. Where an officer is induced by fraud of a third party to levy on goods not the property of the defendant in the process. The defendant in execution was the owner of a piano which was left with a third party, who caused it and another one resembling it to be boxed up for shipment. The officer notified the bailee that he held an execution, and desired her to point out the piano which belonged to the defendant in the process. She, however, induced him to levy on the one belonging to herself, for which she afterwards brought replevin, while the one which she knew the officer intended to levy on was shipped away. The court held that under such circumstances she was estopped from asserting title to the piano which had been seized by her procurement.¹

§ 209. General statement of the rule in the foregoing cases. It does not appear that any general rule can be deduced from the cases above cited. A different practice has grown up in different States. The rule, as stated in Michigan, and a similar rule applies in Wisconsin and Missouri, seems to commend itself not only as being fair, but as certain and convenient of application. It may be stated, in substance, that when goods of similar description, belonging to different owners, become mixed, so that separation becomes impossible, either may take his share or proportion from the common mass, and may if he choose, resort to replevin for the purpose of asserting his right. When logs are mingled in the river, the plaintiff can only pursue such as he can identify; but if not able to distinguish his own, there being no evidence that they differed in value or description from others, with which they were mixed, he may maintain replevin for a quantity out of the common mass equal to the quantity owned by him.² Where the defendant cut logs on the land of another by mistake, and mingled them with his own, so that they could not be distinguished, the plaintiff might have replevied the amount belonging to

determined, without the consent of the others. *Forbes v. Shattuck*, 22 Barb. 568; *Tripp v. Riley*, 15 Ib. 334; *Morgan v. Gregg*, 46 Ib. 184. So, also, in Minnesota. *Ames v. Miss. Boom Co.*, 8 Minn. 473.

¹ *Colwell v. Brower*, 75 Ill. 522.

² *Eldred v. The Oconto Co.*, 33 Wis. 141. See also, *Kaufmann v. Schilling*, 58 Mo. 218.

him from the mass.¹ Where wheat was stored in a warehouse, and by consent of the owner it was mixed with that of the warehouseman, after shipments from the bulk, until an amount not more than that stored by the plaintiff remained, he was held the absolute owner; and a sale by the warehouseman of such remainder was a wrongful conversion, and the owner would have the right to follow it as long as he could identify it.² In Missouri it was said, when the goods are of the same kind, and not capable of identification, that if a division can be made of equal value, as in the case of grain, each may claim his proportionate part.³

§ 210. **Change of form, and the effect of such change on the rights of the parties.** It frequently happens that goods in the possession of a defendant have undergone a material change while in his hands. Cloth may have been made into garments, leather into shoes, logs sawed into boards, or wheat ground into flour; or, perhaps, the article has become a part of something else, as hoop-poles may have been placed upon barrels, timber converted into a house or ship, skins into parchments, on which valuable deeds have been written; or the thing may have undergone a chemical change, which has completely destroyed the original, as corn manufactured into whisky, grapes into wine, apples into cider or vinegar. And the question must be decided what effect these changes have had on ownership, or the right to recover them in replevin.

§ 211. **Rule of the civil law.** Justinian said, "If a man make wine with my grapes, oil of my olives, or garments with my wool, knowing they are not his own, he shall be compelled, by action, to produce the wine, oil or garments."⁴ Pufendorff states the law: "In all cases, it is to be enquired whether the person who bestows a shape on another's matter doth it with

¹ *Stearns v. Raymond*, 26 Wis. 74. Such is also the law in *Minnesota. Schulenberg v. Harriman*, 21 Wall, 44.

² *Young v. Miles*, 23 Wis. 644; *Young v. Miles*, 20 Wis. 615.

³ *Kaufmann v. Schilling*, 58 Mo. 218; *Inglebright v. Hammond*, 19 Ohio, 337; *Ryder v. Hathaway*, 21 Pick. 305. Compare *Kimberly v. Patchin*, 19 N. Y. 330; *Scudder v. Worster*, 11 Cush. 573; *Gardner v. Dutch*, 9 Mass. 427, leading cases on this subject.

⁴ *Justinian Inst.*; *Digest*, Liber, 10 Tit. 4 Leg. 12.

an honest or dishonest design. For he who acts thus out of a knavish principle can by no means pretend that the thing belongs to him, rather than to the owner of the matter, though all the former reasons should occur; that is, though the figure should be most valuable, though the matter should be, as it were, lost or swallowed up in the work, and though he should be in very great want of what he has thus compacted. For the greater part of the two doth not draw it itself; the less, barely by its own virtue, or on its own account. Hence, if a man, out of willful and designed fraud, puts a new shape on my matter, that he may by this means rob me of it, he neither gains any right over the matter by his act, nor can he demand of me a reward for his labor, any more than the thief who digs through my walls can claim to be paid for his trouble in making a new door to my house. * * * All this doth not proceed from any positive constitutions, but from the very dictate and appointment of natural reason. Though nature doth not determine any particular penalty in the case.”¹

§ 212. **Property taken by mistake.** No general rule can be stated which will be applicable in all these cases; each must greatly depend on its own peculiar surroundings. A rule which would be just and convenient in one case, might, in another very similar case, be exceedingly unjust. Thus, if one cut trees by mistake, on another’s land, and convert them into logs, the owner of the trees might recover the logs, and the person who had cut them would lose his labor.² But suppose the trees are made into slabs, and the slabs into costly furniture, then the rule might be extremely unjust.

§ 213. **Change of form does not change the title.** Where the goods can be identified, owner may sustain replevin. The rule may be stated as having a general application, that it is not essential the property should remain in its original form, in order to support replevin, provided it can be identified.³ In other words, a change of form, when the property can be identified, is not a bar to the action unless the change has

¹ Pufendorff Law of Nature, Book 4, Ch. 7, § 10.

² Snyder v. Vaux, 2 Rawle, 427.

³ Wingate v. Smith, 20 Me. 287.

been wrought in good faith by an innocent party, and has materially increased the value, or it has become incorporated with, and forms part of, another thing, which is the principal.¹

§ 214. **The same.** Two cherry trees, growing on the unenclosed wood-land of the plaintiff, were cut by some one unknown; defendant hauled the logs to mill, where they were sawed, and took the boards to his house. The court sustained replevin brought by the owner of the land, saying that whatever alteration of form property may assume, the owner may reclaim it, if he can establish the identity of the original material.² In Pennsylvania, the court held replevin would not lie when the property had undergone any essential change, so that its identity cannot be ascertained. But simple change of form will not defeat the plaintiff's right.³

§ 215. **Goods taken by a thief or trespasser, and enhanced in value by his skill or labor.** It is an elementary principle in the law of all civilized communities that no man can be deprived of his property, except by his voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such taking. The subsequent possession by the thief or the trespasser is a continuing wrong, and if, during its continuance, the wrong-doer enhances the value of the chattel, by labor and skill bestowed upon it, the manufactured article still belongs to the owner of the original material, and he may retake it, or recover its increased value. Even if the wrong-doer sell the chattel to a purchaser having no notice of the fraud, he obtains no title, because the trespasser had none to give.

§ 216. **Rule where the goods come to the hand of an innocent purchaser.** But if a chattel, wrongfully taken, afterward comes into the hands of an innocent holder, who, believing himself to be the owner, converts it into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. In a case of this kind, the change is not

¹ Gray v. Parker, 38 Mo. 165.

² Davis v. Easley, 13 Ill. 198.

³ Snyder v. Vaux, 2 Rawle, (Pa.) 427; Curtis v. Groat, 6 Johns. 168; Babcock v. Gill, 10 John. 287; Brown v. Sax, 7 Cow. 95.

an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original material, and the true owner is not in such case permitted to trace its identity into a manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent party who wrought the change; but he is to put his action for damages as for a thing converted, and he may recover its value as it was when its conversion or consumption took place.¹ It will be seen that the question is not whether a defendant can acquire property by mixing it with other property, or by destroying its identity, but whether the plaintiff can separate his property after such change.²

§ 217. **Owner should reclaim his property before its value is greatly enhanced.** The rule in Wisconsin seems to commend itself, as well for its plainness as for the manifest justice which it seems to deal out to all parties. It is there held that the owner of chattels does not lose his property by mere change of form, at the hands of another; but he should reclaim it before the new possessor has greatly increased its value by the bestowal of his skill and labor. And, in event of his failure to do so, he should be restricted in his recovery to the amount of damages he has actually sustained, unless the taking was accompanied with some circumstances of malice or insult that might make it proper to inflict exemplary damages. This rule, while it protects the owner fully, will be easy of application, and do justice to both parties, when such a result is attainable.³ In Michigan, a somewhat similar

¹ *Hiscox v. Greenwood*, 4 Esp. 174; *Wetherbee v. Green*, 22 Mich. 311; *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Chandler v. Edson*, 9 Johns. 362; *Hyde v. Cookson*, 21 Barb. 92; *Baker v. Wheeler*, 8 Wend. 508; *Snyder v. Vaux*, 2 Rawle, 427; *Riddle v. Driver*, 12 Ala. 59; *Ryder v. Hathaway*, 21 Pick. 305; *Heard v. James*, 49 Miss. 237; *Martin v. Porter*, 5 Mees. & W. 352; *Rightmyer v. Raymond*, 12 Wend. 51; *Baker v. Wheeler*, 8 Wend. 505; *Wild v. Holt*, 9 Mees. & W. 672; *Harris v. Newman*, 5 How. (Miss.) 658; *Putnam v. Cushing*, 10 Gray, (Mass.) 334; *Mallory v. Willis*, 4 Comst. 76. See *Linch v. Welsh*, 3 Pa. St. 294.

² *Ames v. Miss. Boom Co.*, 8 Minn. 470.

³ *Weymouth v. C. & N. W. Ry. Co.*, 17 Wis. 550; *Single v. Schneider*, 30 Wis. 572; *Hungerford v. Redford*, 29 Wis. 345. Consult *Austin v. Craven*, 4 Taunt. 644.

doctrine prevails. When timber worth twenty-five dollars had, by one in the exercise of a supposed right, in good faith, been converted into hoops worth seven hundred dollars, it was held that the title passed to the party who had in good faith expended his labor, and the owner of the timber in such case could not sustain replevin for the hoops.¹ In Pennsylvania, the plaintiff sought to recover, in trover, the value of coal dug out of his mine by mistake, and was allowed only the value of the coal before it was mined. The court says: "It is apparent that any other rule would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her much more than compensation for the injury done."²

§ 218. Where the taking was wrongful, the taker cannot change the title by any change in the property. In New York, in a case in trover, where the defendant wrongfully cut logs on the plaintiff's land and converted them into lumber, the court held, that the property was not changed, and laid down the rule, that in cases of wrongful taking, the defendant cannot by any act of his, change the title to the property.³ Probably the strongest case in the books will be found in New York. It was where corn was taken by a willful trespasser and converted into whisky. The court held, that the change of form had not changed the ownership, and that the whisky belonged to the owner of the corn, and was liable to be seized on execution for his debts.⁴ This case gains importance from

¹ *Wetherbee v. Green*, 22 Mich. 311.

² *Forsyth v. Wells*, 41 Pa. St. 291. *Contra*, see *Robertson v. Jones*, 71 Ill. 405. If a man take my garment and embroider it with silk, I may take back the garment; but if I take the silk from you and embroider or face my garment, you shall not take my garment for your silk, which is in it, but are put to your action for my taking the silk from you. *Anon Popham*, 38.

³ *Brown v. Sax*, 7 Cow. 95. See, also, *Hyde v. Cookson*, 21 Barb. 92; *Martin v. Porter*, 5 Mees. & W. 352; *Betts v. Lee*, 5 Johns. 348; *Rightmyer v. Raymond*, 12 Wend. 51; *Wild v. Holt*, 9 Mees. & W. 672; *Curtis v. Groat*, 6 Johns. 168; *Babcock v. Gill*, 10 John. 287; *Ricketts v. Dorrel*, 55 Ind. 470. So, when wool was taken and made into coats. *Curtis v. Groat*, 6 John. 168.

⁴ *Silisbury v. McCoon*, 3 Comst. 380.

the fact that it had twice before been considered in the supreme court and a contrary conclusion reached.¹

§ 219. **Measure of damages in such cases.** The rule as before stated does not apply to cases of willful taking. A trespasser cannot change the property by changing the form, so long as the identity of the article can be shown. If the labor of the defendant has added to the value, it is in his power to relinquish the increased value or to keep it himself. If he claims the property, it is, under the statutes in many States, in his power to retain it by giving bond to the sheriff; and the effect of a verdict for plaintiff, for value, is a transfer of the title to the defendant. The rule of damages, if the trespass was by mistake, would be the value before the defendant had, by bestowal of his own labor, increased it. If the trespass was willful, the damages would be the value at the time of bringing suit.²

§ 220. **Change of form by agreement does not affect the rights of the parties.** Where a levy was made upon gold coin, which for convenience was converted into large bills, and the bills were then replevied by a stranger to the execution, *held*, that the substitution of the bills by agreement would not defeat the action.³

§ 221. **Property taken and annexed to real estate or other thing which forms the principal.** If property taken, be annexed to and made part of some other thing which forms the principal, the owner cannot, as a rule, sustain replevin, but must resort to his action for damages. When timber has been converted into boards and they have been incorporated with others into a house, the chattel is regarded as a part of the building, and replevin does not lie.⁴ It will be seen that

¹ *Silisbury v. McCoon*, 3 Comst. 380, and S. C., 4 Denio, 332; S. C., 6 Hill, 426. See, also, *Gray v. Parker*, 38 Mo. 160. See the able and exhaustive argument of Mr. Hill, in note to 3 Comst. 380.

² *Herdie v. Young*, 55 Pa. St. 178; *Young v. Herdic*, 55 Pa. St. 172; *Snyder v. Vaux*, 2 Rawle, 427; *Heard v. James*, 49 Miss. 236; *Bull v. Griswold*, 19 Ill. 631.

³ *St. L. A. & C. R. R. v. Castello*, 28 Mo. 380. For a case of trover for the produce of stolen notes, see *Golightly v. Reynolds*, Loft. 88.

⁴ *Snyder v. Vaux*, 2 Rawle, 423; *Ricketts v. Dorrel*, 55 Ind. 470; *Betts v. Lee*, 5 Johns. 348; *Brown v. Sax*, 7 Cow. 95; 2 Bla. Com. 404.

these rules are for the most part arbitrary, differing widely in cases which are very similar. And the difficulty of deducing any rule applicable in all cases is apparent. It should in each case be considered whether the taking and subsequent change of form was made by mistake, while in the exercise of a supposed right, or was in willful disregard of the rights of the owner. In the former case, where the property had undergone a material change, largely increasing its value, the rights of the party who had in good faith bestowed such increase of value must be respected. But when the taking and subsequent change was in willful disregard of the rights of the plaintiff, it is eminently proper that the taker should not be permitted to derive any profit from his wrongful act, and that the owner be allowed to recover his goods, even if it result in taking with them some of the fruits of the wrong doer's labor.

§ 222. **Description to be employed where the property has undergone a change.** When the suit is brought for property which has undergone a change of form, the writ and proceeding should describe it in the form in which it exists at the time when the suit is begun.¹ And the ownership of the original materials and proof of identity may be given in evidence upon the trial.

¹ Wingate v. Smith, 20 Me. 287.

CHAPTER IX.

CHATTEL MORTGAGE.

	Section.		Section.
Rights of a mortgagee in a		sold on execution . . .	222 <i>b</i>
chattel mortgage . . .	222 <i>a</i>	Rights of mortgagee against	
The mortgageor has an inter-		third parties . . .	223
est which may be seized and			

§ 222 *a*. **Rights of a mortgagee in a chattel mortgage.** Upon a failure of the mortgageor of chattels to perform the conditions, the legal title to the property conveyed in a chattel mortgage of the usual form becomes vested absolutely in the mortgagee,¹ and he may recover the property in replevin. Where there are several notes he does not lose his lien upon the non-payment of the first note becoming due, but may wait until the last note matures, and then take the property.²

§ 222 *b*. **The mortgageor has an interest which may be seized and sold on execution.** Where a mortgageor is in possession of mortgaged chattels under a clause in the mortgage which gives him the right to retain possession until the mortgage is due, he has an interest which but for the clause giving the mortgagee, (in case he feels himself insecure,) a right to take possession, might be seized and sold on execution against him.³ When such goods are seized and the debt matures before the sale, or where the mortgage contains the insecurity clause above referred to, the

¹ *Brown v. Bement*, 8 Johns. 96; *Saxton v. Williams*, 15 Wis. 292; *Ackley v. Finch*, 7 Cow. 290; *Butler v. Miller*, 1 Comst. (N. Y.) 496; *Langdon v. Buel*, 9 Wend. 80; *Livor v. Orser*, 5 Duer, 501; *Patchin v. Pierce*, 12 Wend. 61; *Heyland v. Badger*, 35 Cal. 411; *Brookover v. Esterly*, 12 Kan. 149.

² *Cleaves v. Herbert*, 61 Ill. 127. See *Reese v. Mitchell*, 41 Ill. 365.

³ *Saxton v. Williams*, 15 Wis. 292; *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32; *Prior v. White*, 12 Ill. 261; *Schrader v. Wolflin*, 21 Ind. 238; *Mattison v. Baucus*, 1 Comst. (N. Y.) 295; *Cotton v. Watkins*, 6 Wis. 629.

mortgagee may demand the goods, and on refusal may sustain replevin for them.¹ In such cases the possession of the mortgagee can only be asserted in compliance with the terms of the mortgage. The distinction between a chattel mortgage and a pledge is clearly stated in *Heyland v. Badger*, 35 Cal. 409. The mortgage passes the property to the mortgagee, subject to be redeemed according to the terms of the contract, and if not redeemed the property becomes absolute in the mortgagee, who may sustain replevin for the goods, or trover for their value. The mortgageor could not maintain trover against the mortgagee for refusing to deliver the goods, or for selling them, for the title at law is in the mortgagee and trover depends on title, general or special, to support it, and the mortgageor has no title — only an equitable right to redeem the property by payment of the amount due on the mortgage.²

§ 223. **Rights of mortgagee against third parties.** Where a chattel mortgage is properly executed and recorded, so as to be a valid transfer of the property in the county where the property is situated, and where the parties and property are bound, the subsequent removal of the property by the mortgageor to another county or State in contravention of the terms of the mortgage, will not deprive the mortgagee of his right to the property. He may follow it and assert his title in an action of replevin against the mortgageor so removing it, and the authorities are tolerably uniform that a purchaser of such property in a foreign county or State, without notice and for value, cannot resist the claim of the mortgagee. The mortgage being an absolute transfer of the property to the mortgagee

¹ *Simmons v. Jenkins*, 76 Ill. 481; *Carty v. Fenstemaker*, 14 Ohio St. 457; *McIsaacs v. Hobbs*, 8 Dana, (Ky.) 268; *Putnam v. Cushing*, 10 Gray, (Mass.) 334; *Bates v. Wilbur*, 10 Wis. 415; *Randall v. Cook*, 17 Wend. 55; *Newman v. Tymeson*, 13 Wis. 172; *Bailey v. Burton*, 8 Wend. 339; *Eggleston v. Mundy*, 4 Gibbs, (Mich.) 295; *Beach v. Derby*, 19 Ill. 622; *Frisby v. Langworthy*, 11 Wis. 379.

² Consult *White v. Phelps*, 12 N. H. 385; *Burdick v. McVanner*, 2 Denio, 171; *Holmes v. Bell*, 3 Cush. 323; *Tannahill v. Tuttle*, 3 Mich. 110, citing many cases. *Wood v. Dudley*, 8 Vt. 430; *Brown v. Bement*, 8 Johns. 96; *Tabot v. De Forest*, 3 G. Greene, (Iowa,) 586; *Dewey v. Bowman*, 8 Cal. 150; *Ferguson v. Thomas*, 26 Me. 499. See, in this connection, *Mobley v. Letts*, 61 Ind. 11; *Hunt v. Bullock*, 23 Ill. 325; *Titus v. Mabee*, 25 Ill. 257.

with a statutory permission to the mortgageor to retain possession for a limited time, the bare possession does not confer title. Sale by the mortgageor under such circumstances is, in its most favorable light, looked upon as a sale by a bailee, without right, and such sale cannot affect the title of the mortgagee.¹

¹ *Welch v. Sackett*, 12 Wis. 243; *Smith v. McLean*, 24 Iowa, 322; *Cotton v. Watkins*, 6 Wis. 629; *Blystone v. Burgett*, 10 Ind. 28; *Pickard v. Low*, 15 Me. 48; *Offut v. Flagg*, 10 N. H. 46. See, also, *Martin v. Hill*, 12 Barb. 633; *Brackett v. Bullard*, 12 Met. 309; *Ryan v. Clanton*, 3 Strob. (S. C.) 413; *Barker v. Stacy*, 25 Miss. 471; *Jones v. Taylor*, 30 Vt. 42; *Loeschman v. Machin*, 2 Stark. 311.

CHAPTER X.

PROPERTY SEIZED FOR A TAX.

	Section.		Section.
Property seized for the payment of a tax not repleviable . . .	224	the party to employ any other remedy	233
Irregularity in issuing the warrant does not change the rule	225	The action permitted where the plaintiff does not ask delivery of the property . . .	234
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Prohibition extends to goods seized for tax due the United States or an incorporated village	227	The bare assertion of the defendant that the goods are seized for tax, not sufficient . . .	236
The usual form of the prohibition is a requirement in the affidavit	228	The warrant must be regular on its face, and purport to be issued by competent authority	237
The jealousy with which the courts look upon attempts to evade this requirement . . .	229	It must appear to be for a tax which, by legal possibility, may be valid	238
Questions of double assessment cannot be tried in this action	230	The seizure must be by an officer	239
Property seized for the payment of a tax due from another person	231	Where an officer goes out of his bailiwick	240
The same	232	The prohibition extends to goods seized for payment of a fine	241
The prohibition of this remedy does not affect the rights of		Replevin against a purchaser . .	242

§ 224. **Property seized for the payment of a tax not repleviable.** There is a provision common to the laws of all the States, that goods seized on legal process issued for the collection of a tax cannot be retaken from the officer by a writ of replevin.¹

¹ *People v. Albany C. P.*, 7 Wend. 484; *Bilbo v. Henderson*, 21 Iowa, 56; *Macklot v. City of Davenport*, 17 Iowa, 379; *Hershey v. Fry*, 1 Iowa, 593; *Vocht v. Reed*, 70 Ill. 491; *LeRoy v. East Sag. Ry. Co.*, 18 Mich. 233; *Mc*

The reason for this rule is found in the necessity for protecting the public revenue, and to prevent the delay in its collections which might result if property seized by an officer upon a warrant for the collection of taxes were permitted to be taken from his hands pending an inquiry into the propriety of the seizure. While other and ample means of redress are provided for the owner, in case his property is wrongfully distrained, this remedy is forbidden. The prompt collection of the public revenue is regarded as a standing and public exigency, to which private rights must yield or be abridged; at least, of this action. The law therefore forbids replevin of goods so seized, and remits the party to his action for trespass or trover, or such other proper action as he may elect.¹ "Disastrous indeed," says Justice BREESE, "would be the consequences to the public, was it allowed to every taxable inhabitant who may have conceived a notion that a law of general application imposing taxes is void, and therefore he shall be permitted to arrest its operation, and thus break down the financial system of the State. If one may do it, the whole community may, and ruin and disgrace would inevitably follow the extinction of the State credit thus brought about. The law forbids the consideration of the question of the legality of a tax, assessment or fine levied under any law standing on the statute book of this State, by means of the action of replevin, and for the reasons we have given."²

§ 225. Irregularity in issuing the warrant does not change the rule. Replevin will not lie for property taken by virtue of a warrant for the collection of a tax, even though the warrant may have issued erroneously or irregularly, or contrary to law. If on its face it gives the officer authority to collect a tax, and to seize property for that purpose, replevin for property so seized cannot be sustained in this action. It is not that greater license is given to an officer collecting a tax than to one exe-

Claghry v. Cratzenberg, 39 Ill. 122; *Bringhurst v. Pollard*, 6 Porter, (Ind.) 452; *Buell v. Ball*, 20 Iowa, 282; *Hudler v. Golden*, 36 N. Y. 446; *Stoddard v. Gilman*, 22 Vt. 570; *Troy & Lans. R. R. v. Kane*, 72 N. Y. 614.

¹ *Stiles v. Griffith*, 3 Yeates, (Pa.) 82; *Heagle v. Wheeland*, 64 Ill. 423; *Le Roy v. East Sag. Ry. Co.*, 18 Mich. 233.

² *McClaghry v. Cratzenberg*, 39 Ill. 122.

cutting other process. An irregular warrant or a void levy of a tax warrant is no protection to the officer; but the injured party cannot employ replevin; he cannot begin a contest over the regularity of the proceeding by withdrawing the property from the custody of the law.¹

§ 226. Nor the fact that no taxes are due from the party whose goods are seized. When a defendant justified under a tax warrant, a replication that there were no taxes due from the plaintiff to the town would in effect bring up the entire question of the legality of the tax, and such a replication would be bad.²

§ 227. Prohibition extends to goods seized for tax due the United States or an incorporated village. The prohibition is not confined to goods seized for the payment of taxes due the State, but extends to and embraces goods which have been seized by virtue of a warrant for the collection of taxes levied under a law of Congress,³ or under the internal revenue laws of the United States.⁴ So, where the seizure was for taxes levied by virtue of a process for the collection of a tax due an incorporated city, town or village, levied under its corporate powers, the same rule applies, and prohibits replevin of the property from the officer seizing it. In this case the municipal authorities are regarded as acting under a law of the State, and all the reasons which prohibit the seizure in the case of the State apply when the tax is for the benefit of a local municipal corporation, to the same extent and in the same manner. In all these cases, therefore, when the seizure has been made by an officer acting under the authority of a tax warrant valid on its face, the property seized is exempt from the operation of the writ of replevin.⁵

¹ *People v. Albany Com. Pleas*, 7 Wend. 485; *Hudler v. Golden*, 36 N. Y. 446; *Buell v. Schaale*, 39 Iowa, 293; *Niagara Elev. Co. v. McNamara*, 2 Hun, (N. Y.) 416.

² *Mt. Carbon Coal Co. v. Andrews*, 53 Ill. 177.

³ *O'Reilly v. Good*, 42 Barb. 521.

⁴ *Delaware R. R. Co. v. Prettyman*, 7 Int. Rev. Rec. 101; *Pullen v. Kensing*, 11 Int. Rev. Rec. 197; *Brice v. Elliot*, 8 Legal News, 322.

⁵ *Mt. Carbon Coal Co. v. Andrews*, 53 Ill. 183; *People v. Albany Com. Plea*, 7 Wend. 485; *Savacool v. Boughton*, 5 Wend. 178. *Due process* of law

§ 228. The usual form of the prohibition is a requirement in the affidavit. This exemption, as was stated, is a statutory provision common to all the States where this action is in use; and though the common law was not unlike the statute on this subject, local statutes have defined and emphasized the prohibition, and control the practice in all cases. The usual form of the statutory prohibition is a provision that the writ shall not issue for the delivery of the property in any case, unless the plaintiff shall first file an affidavit that the goods for which the writ is about to be sued out have not been taken for any tax, etc., levied by virtue of any law of the State.¹ This provision is imperative, and any attempt to evade its letter or spirit will be regarded as an attempt to evade one of the vital prerequisites to the issuing of the writ. When the plaintiff filed an affidavit that "the property had not been taken for any *legal* tax, as this affiant is informed and believes," the court said the departure from the requirements of the statute was very palpable, and upon the plaintiff desiring leave to amend the affidavit, the court refused permission and quashed the writ, holding that it was informed of the design of the plaintiff to test the constitutionality of the law under which the tax was assessed. "The amended affidavit," said the court, "if filed, and trial had, would have presented the same question." The court would have been compelled to dismiss the suit the very moment it was shown that a question of taxation was involved, and the constitutionality of the law imposing the tax was the hinge on which the case turned.² Where the defendant in replevin pleaded formally that the property had been seized for a tax due the town of Murphreysboro', setting up, also, his authority as collector of taxes, and the plaintiff replied, 1st, that defendant was not duly or legally appointed collector, etc. 2d. That there was no such corporation or city. 3d. No valid ordinance in force authorizing defendant to dis-

in the assessment of taxes does not require a judicial proceeding. *McMillen v. Anderson*, U. S. Sup. Ct. Oct. 1877; *Cent. Law Journal*, Nov. 23, 1877, p. 445; *Pullen v. Kensinger*, 11 *Int. Rev. Rec.* 197.

¹ See *Bringhurst v. Pollard*, 6 *Ind.* 452.

² *McClaghry v. Cratzenberg*, 39 *Ill.* 123. See *McPhelomy v. Solomon*, 15 *Ind.* 189.

train, etc. 4th. No tax due from plaintiff. 5th. The goods not legally distrainable. To these replications a demurrer was interposed and sustained, and an appeal taken to the supreme court, where the decision was affirmed, the court holding, 1st. Replication was no bar, because it failed to deny that the defendant was collector *de facto* or *de jure*. The question whether he was lawfully in office could not be tried in this action; hence, the replication tendered a collateral issue. 2d. The question whether the town of Murphreysboro' was legally incorporated could not be tried in this proceeding. Had the replication been that the town had never been and was not then acting as a corporation, and the defendant acted without color of right, the question would have been different, and the replication might have been sufficient. "The fourth replication sought to present the question whether there was any tax due the town. It would, as pleaded, have opened the entire question whether the tax was legally levied, and might have led to an investigation whether the town had observed the requirements of its charter and ordinance in levying the tax, and led to the very controversy which the General Assembly intended should not be litigated in this form of action." The questions of the legality of the levy, or of the observance or neglect of any of the formal requirements of the levy, cannot be inquired into in this action.¹

§ 229. The jealousy with which the courts look upon attempts to evade this requirement. The courts look with extreme jealousy upon all the provisions of the law upon this subject, and any attempt to evade them, or by indirection, to use this writ for the purpose of defeating or delaying the collection of a tax, will be stranded at the threshold. Where the affidavit stated that the property had not been taken "*in execution*" for any tax assessment or fine, the court said: "The statute required an affidavit that the property had not been taken for any tax, etc. The plaintiff has sworn that it had not been taken by virtue of a particular process, that is, the process of execution; but this may be true, and still the

¹ Mt. Carbon C. & R. R. Co. v. Andrews, 53 Ill. 184.

property may have been distrained for taxes," and the affidavit was held insufficient.¹

§ 230. Questions of double assessment cannot be tried in this action. Questions of erroneous, illegal, or double assessment, cannot be tried in this action. If error in the assessment, or mistake or illegality in the levy, could be tried, very few cases would be found to lack these elements, or some of them. Where a collector distrained for a tax assessed against the owner of property, he cannot replevy it by showing that it was, when assessed, in the hands of an agent, and had been assessed as belonging to the latter, and the tax paid on such assessment.²

§ 231. Property seized for the payment of a tax due from another person. When a party has his property seized for a tax due from another person, with whom he is in no way connected, and for which he is in no way responsible, replevin will be permitted at the suit of the owner. This rule will not apply where the taxgatherer finds the property seized in the possession of the delinquent tax-payer; in making the seizure in such cases the officer does nothing but his duty.³ But when the tax collector seizes upon the property of A. in A.'s possession, to satisfy a tax due from B., whether the seizure be by design or evident mistake, the act is wrongful, and the warrant, though never so formal and proper so far as A. is concerned, yet it is no warrant against B., and by all the anal-

¹ *Campbell v. Head*, 13 Ill. 126. When property which has been seized for a tax is by any means replevied from the officer, the court will, at once upon that fact becoming apparent, dismiss the action and order a return. *McClaghry v. Cratzenberg*, 39 Ill. 123; *People v. Albany Com. Pleas*, 7 Wend. 485; *Bringham v. Pollard*, 6 Ind. 452; *Dowell v. Richardson*, 10 Ind. 574. When the plaintiff made oath that goods were not taken for any tax, and the collector and his deputy both swore in positive terms that it was taken for a tax, we should probably assume that the plaintiff was mistaken, and did not know that it was taken for a tax. *O'Reilly v. Good*, 42 Barb. 521. A tax warrant, regular on its face, is a protection to the officer, so far as the writ of replevin is concerned, and while the owner may enquire into the legality of the levy by *certiorari* or other proceeding, he cannot by replevin of the property. *Bilbo v. Henderson*, 21 Iowa, 57.

² *Palmer v. Corwith*, 3 Chand. (Wis.) 297.

³ *Sheldon v. Van Buskirk*, 2 Comst. (N. Y.) 473.

ogies of the law in similar cases, will not furnish any justification to the officers.¹ A warrant for the collection of taxes by distraint on the goods of A. is, in fact, no justification of a willful trespass by the officer upon the goods of B.,² and replevin will lie.

§ 232. **The same.** The case of *Vocht v. Reed*, 70 Ill. 491, holds a doctrine directly contrary to that stated above. The law in Illinois is of course settled by this case; and in States where a similar statute exists, should the case arise for the first time, the construction adopted in Illinois may be followed, or the decision in Michigan or New York may be thought the most worthy example.³

¹ *Travers v. Inslee*, 19 Mich. 100; *Stockwell v. Veitch*, 15 Abb. Pr. 412.

² *Atlantic, etc., R. R. v. Cleino*, 2 Dillon, 175; *Noyes v. Haverhill*, 11 Cush. 338. See and compare *Heagle v. Wheeland*, 65 Ill. 425.

³ Opinion of the court by Mr. Justice CRAIG: Upon comparison of the two clauses of § 3, it will be seen there is a striking difference between them. The one reads, "And that the same has not been taken for any tax, assessment or fine, levied by virtue of any law of this State;" and the other clause reads, "nor seized under any execution or attachment against the goods and chattels of such plaintiff *liable to execution or attachment*." Where the goods of a stranger to an execution are taken, he can, with truth and propriety, swear that the property was not taken by virtue of an execution or attachment against his goods and chattels liable to execution or attachment; but where property is taken by a tax collector under a warrant for taxes, a different case is presented. The point is not whether the property is *liable* to a tax warrant, as is the case when taken on execution or attachment, but has the property been taken on a tax warrant? If it has, the writ of replevin cannot issue, because the statute says no writ shall issue until an affidavit is filed that the property has not been taken for any tax assessment or fine levied by virtue of any law of this State. The effect of the statute is that the action of replevin does not lie in any case where the property is seized by a tax collector under a tax warrant. The object and intent of the statute are obvious. The government cannot be carried on, and the laws enforced, without the revenue is collected. If the collectors of the revenue were to be hampered and tied up by replevin suits when they are collecting the taxes, it would be found difficult, if not impossible, to make collection; and we have no doubt the legislature foresaw these difficulties, and prohibited the action of replevin for the very purpose of avoiding them. It is, however, insisted by appellee that it is a great hardship to have one man's property taken to pay a tax of another. The tax collector has no right to take the property of one to pay the tax of another; if he does it, he is liable. The injured party has his remedy in trespass or trover. If the officer takes property of one to pay the tax

§ 233. The prohibition of this remedy does not affect the right of the party to employ any other proper remedy. While the law prohibits the use of the action of replevin for the recovery of goods seized for a tax, it by no means debars the injured party of other and proper remedies. The intention of the law is to prevent the withdrawal of property seized for a tax from the custody of the officer; not to prevent the party from proceeding to recover damages in case the seizure was wrongful. The owner of goods so seized may, therefore, sue the officer in trespass, or any other proper form of action, and

of another, he acts at his peril; and the laws of the country will compel him to respond in ample damages to the injured party; so that the law, while it prohibits a remedy by action of replevin, affords ample protection in another form of action. The judgment of the circuit court will be reversed and the cause remanded.

BREESE, Chief Justice, dissenting: I cannot believe it was the intention of the legislature to authorize the levy and sale of the property of A. to pay the taxes of B. The design of the statute evidently was to prevent any person whose property has been levied on, for taxes assessed against him, to question it in an action of replevin, and that is the extent of *McClaghry v. Cratzenberg*, 39 Ill. 117, as the reasoning of the opinion shows. A person may be passing through a town or city of this State, with his vehicle, and it was seized by a tax-gatherer for the taxes, not assessed against that property or its owner, but against another person. Under this decision, that official, in Chicago or any other place, can enter the dwelling of a person and take from it his choicest furniture, his heirlooms, and valuable works of art, to pay taxes not assessed against it, and for which it is not liable. It is poor satisfaction, and the merest trifling with one's right to property, to say he can sue the officer in trespass or trover. The officer may not be able to respond in damages, and in the meantime the owner has lost an article of property for which money would be no compensation, as there is a matter of sentiment involved in the possession of such. It would be no satisfaction to one on a journey to have his horse and carriage taken from him in this way, and be denied a speedy remedy, by replevin, to repossess himself of his property and proceed on his journey. Nor would it be to a farmer who has brought a load of wheat to market. In this case, there is no public necessity for this levy, as the land, upon which the tax was assessed, was immovable, and could be sold, as in like cases, for the taxes. I cannot believe it could have been the intention of the law-makers that this act should have the construction now given by this court. Every man's property is now at the mercy of the tax-gatherer, whether taxes are due upon it or not. This is, in my opinion, a great wrong and injustice.

Mr. Justice SCOTT: I concur with the Chief Justice in the above construction of the statute. *Vocht v. Reed*, 70 Ill. 491.

may recover the value of his goods with damages for the taking and detention.¹

§ 234. The action permitted where the plaintiff does not ask delivery of the property. The action of replevin has been permitted to contest the legality of a tax in cases where the plaintiff does not claim delivery of the goods pending the suit. This, it will be observed, in no way interferes with the prompt collection of the revenue, which is the only reason for the general rule, and there appears no objection in the principle to allowing the action in all cases as a means of contesting the validity of the tax levy, provided the writ is not allowed to interfere with the possession of the property by the officer who holds the tax warrant, or delay the collection of the tax. The statute in many States permits the plaintiff to sue in this form of action without asking deliverance until the court shall have had an opportunity to try the title and pronounce upon the rights of the parties. In such case the action is similar to trover; the judgment is for the property, or its value in case it cannot be had. This proceeding in no way delays the collection of the taxes, and none of the rules which apply in such cases apply in this.²

§ 235. The prohibition does not extend to a purchaser at tax sale. While property which has been seized upon a warrant for the collection of a tax or a fine cannot be replevied, the prohibition goes no further than to the officer. The owner of goods wrongfully seized and sold for taxes may employ this remedy against the purchaser, and may show that the judgment levy or sale was void, or that no tax was due, or in fact may set up any error which would make the sale void. A void judgment, levy, or sale for tax conveys no better title to the purchaser than a void judgment upon any other claim. So, also, where the property is seized and sold for a tax due from

¹ *Dow v. Sudbury*, 5 Met. 73; *Shaw v. Becket*, 7 Cush. 442; *Cardinal v. Smith*, Deady, C. C. 197; *Ware v. Percival*, 61 Me. 391; *People v. Supervisors of Chenango*, 11 N. Y. 563; *Supervisors, etc., v. Manny*, 56 Ill. 161; *Lauman v. Des Moines C.*, 29 Iowa, 310.

² *Dudley v. Ross*, 27 Wis. 680.

another person, the owner may have replevin against the purchaser.¹

§ 236. The bare assertion of the defendant that the goods are seized for tax, not sufficient. While the law will not permit the action of replevin in a case where the property sought to be recovered was seized for a tax, yet the bare assertion of the defendant that such is the case, or an unsupported plea, will not justify the court in refusing to proceed with the case. The defendant should produce some warrant, or valid authority to him, to take the property, or show the court by satisfactory evidence that his claim is valid and just, and that the seizure was made in the discharge of his duty as a tax collector.² Were the law otherwise any defendant, whether an officer or trespasser, might claim the immunity which the law only extends to its officers.

§ 237. The warrant must be regular on its face, and purport to be issued by competent authority. The warrant must be regular on its face; it must purport to be a regular tax warrant; it must in terms authorize the officer to proceed with the collection of the tax mentioned by seizure of the goods of the tax payer. It must also purport to be issued by some competent legal authority, and must be for a tax which can by legal possibility be levied.³ A sham warrant issued by irresponsible parties, or a regular warrant for a sham tax, where it is apparent from the face of the warrant that it was issued without jurisdiction, will furnish no protection to the officer and replevin will lie. When the law authorized the village trustee to assess the value of the improvement of a *sidewalk* on the property of adjoining owners, and they did assess the value of an improvement of the *street*, and the warrant so showed on its face, it was held to confer no authority, and replevin of property seized under it was sustained.⁴ So when

¹ *Dudley v. Ross*, 27 Wis. 679; *Macklot v. Davenport*, 17 Iowa, 379; *Heagle v. Wheeland*, 64 Ill. 423; *Stiles v. Griffiths*, 3 Yeates (Pa.) 82; *Bilbo v. Henderson*, 21 Iowa, 57.

² *Mt. Carbon Coal Co. v. Andrews*, 53 Ill. 177; *Hudler v. Golden*, 36 N. Y. 446; *Le Roy v. East Sag. R. R.*, 18 Mich. 238.

³ *Hudler v. Golden*, 36 N. Y. 446.

⁴ *Wright v. Briggs*, 2 Hill. 77.

the defendants justified the seizure by virtue of a tax warrant for taxes due the city of Muscatine; the boundaries were extended, taking in the plaintiff's farm land for purposes of taxation, and the act had been held unconstitutional—*held*, that replevin would lie.¹ And in the latter case the plaintiff in replevin was held not estopped from denying the validity of the tax by the fact that he has paid several similar taxes on the same property before.²

§ 238. It must appear to be for a tax which, by legal possibility, may be valid. It must appear that the tax was such as could by legal possibility have been properly and lawfully levied by regular and proper legal proceedings for that purpose. Thus, when the act of incorporation of a railroad company provided that the company should pay annually a specified tax of one-half of one per cent. on the whole amount of its paid in capital stock, in lieu of all other taxes on the property of the company, the company was allowed to sustain replevin against a collector who seized their property for the payment of a tax assessed by a city situated on the line of its road.³ Where it is made to appear that the tax under which the seizure was made was never levied, or that the levy was afterwards legally rescinded, the owner of the property seized for such tax may sustain replevin. Thus, at a town meeting a certain tax for road purposes was laid, but at a subsequent legal town meeting the tax was rescinded. The collector could not legally proceed to collect such tax, and where he seized property for that purpose the owner was permitted to sustain replevin.⁴

§ 239. The seizure must be by an officer. The seizure must be a legal seizure by an officer duly authorized to act in that behalf. It is true the title of the officer cannot be questioned in this action,⁵ but the officer must at least assume to be an officer authorized to act at the time and place where the

¹ Morford v. Unger, 8 Iowa, 82.

² Buell v. Ball, 20 Iowa, 282.

³ Le Roy v. East Saginaw City Ry., 18 Mich. 237.

⁴ Stoddard v. Gilman, 22 Vt. 570..

⁵ Mt. Carbon Coal Co. v. Andrews, 53 Ill. 183.

seizure was made. An officer duly authorized in one county or district would have no authority to go into another county or district to seize property, even though the property was once within his bailiwick and assessed there.

§ 240. Where an officer goes out of his bailiwick. When plaintiff's wagon was distrained for a school tax, it appeared that after the tax was levied a new school district was created, and plaintiff resided in the new district and contended that the seizure by distress was unlawfully made by the secretary of the old district within the limits of the new. *Held*, that tax was no lien until seizure; that the tax gave no right to seize the wagon where it could be found, and the seizure without the district was unauthorized and illegal. The law forbids the replevin of property seized for any tax, assessment or fine levied under the authority of law. The principle extends to the seizure as well as to the assessment, and equally forbids all questions respecting the validity and regularity of the warrant and of the assessment, but there must be some color of authority for making the seizure. For instance, it has been held that when the warrant was issued without jurisdiction, and when the statute under which the assessment was made was unconstitutional, that replevin would lie. If this were not the rule defendant in replevin might always defeat the action by pretending that the property had been taken to satisfy a tax. An officer without his bailiwick is without authority, and his seizure by distress for tax is illegal.¹

§ 241. The prohibition extends to goods seized for the payment of a fine. The statute which prohibits the replevin of goods seized for the payment of a tax also embraces goods seized for the payment of a fine.² Cases of replevin for goods seized for non-payment of a fine are not numerous, but the same principles would apply in such a case that govern cases of seizure for tax. The seizure should be by process formal on its face, issued by a tribunal which has by law authority to impose a fine, and in a case where by legal possibility a fine can rightfully be imposed. The execution of the process ought

¹ McKay v. Batchellor, 2 Colorado, 591.

² Pott v. Oldwine, 7 Watts, 173; Martin v. Mott, 12 Wheat. 19.

to be by an officer who at least is an officer *de facto* at the time and place where the seizure is made. Should any one of these essentials be lacking in a seizure for a fine, by the analogies which obtain in other cases, replevin would lie for the goods so seized.¹

§ 242. **Replevin against a purchaser.** Where the defendant justified under a pound master's sale, it was held that an officer to justify a seizure of property must produce a process regular and valid on its face. That to sustain a sale by a pound master he would be bound to prove that the animal was in the situation which the ordinance had designated to authorize him to make seizure before he could be justified. The main fact that they are officers of the law does not constitute a justification for seizing and selling property, but the authority must be shown. A person having purchased any article of personal property at a sheriff or constable's sale, and sued by the former owner for its recovery, must deraign and show his title through and by an execution against the claimant, or the owner of the property, and a sale by the officer. The mere proof of a sale would not suffice to establish the transfer of the title to the purchaser. Nor has the law created any greater or different presumption in favor of a sale made by a pound master than by a sheriff or constable. In either case the validity of the sale must be established by showing the authority, which cannot be presumed. In the one case it is done by documentary evidence; in the other it is necessarily oral.² Where property is sold for a fine or penalty, the owner may employ replevin against the purchaser, and require him to show the validity of the proceeding under which the sale was made.³

¹ See *Martin v. Mott*, 12 Wheat. 19.

² *Clark v. Lewis*, 35 Ill. 422.

³ *Heagle v. Wheeland*, 64 Ill. 423

CHAPTER XI.

GOODS IN THE CUSTODY OF THE LAW.

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§ 243. **Replevin does not lie for goods in the custody of the law.** It was an ancient maxim of the law, that goods seized by an officer, in obedience to legal process, were in the custody of the law.¹ The court regarding the officer only as its minister, and goods in his possession, upon the order or mandate of the court, as in the custody of the court, they could only be taken upon its order or permission. Any attempt to interfere with them, without such permission, was looked upon as a contempt. Replevin, therefore, from an officer so holding property was looked upon as a contempt, and punished.²

¹ *McLeod v. Oates*, 8 Ired. (N. C.) 387; *Jenner v. Joliffe*, 9 Johns. 384; *Buckley v. Buckley*, 9 Nev. 379; *Raiford v. Hyde*, 36 Geo. 93; *Phillips v. Harriss*, 3 J. J. Marsh. (Ky.) 122; *Reade v. Hawks*, Hob. 16; *Reeside v. Tischer*, 2 Har. & G. (Md.) 320; *Watkins v. Page*, 2 Wis. 97; *Hall v. Tuttle*, 2 Wend. 478; *Morgan v. Craig*, *Hardin*, (Ky.) 101.

² *Funk v. Israel*, 5 Iowa, 450; *Phillips v. Harriss*, 3 J. J. Marsh. (Ky.) 123; *Cooley v. Davis*, 34 Iowa, 128; *Powell v. Bradlee*, 9 Gill. & J. (Md.) 220; *Hagan v. Deuell*, 24 Ark. 216; *Goodrich v. Fritz*, 4 Ark. 525; *Allen v. Staples*, 6 Gray, (Mass.) 493; *Beers v. Wuerpul*, 24 Ark. 273; *Shearick v. Huber*,

§ 244. **Limitation upon this rule.** This rule, though still in force, must be understood as applying only to cases where the seizure is rightful, and upon valid and sufficient process, and not generally to all cases where an officer assumes to execute process.

§ 245. **Lies for goods wrongfully seized by an officer upon process.** If an officer, in attempting to execute process of execution or attachment, by mistake or design take goods not the property of the defendant in the writ, or goods not lawfully subject to seizure on such writ, he is a trespasser, and acquires no right to the goods seized;¹ and the injured party may have replevin for their recovery, or may proceed against the officer in trespass or trover, at his election.²

§ 246. **Of the right of a person to take possession of his goods which have been wrongfully seized by an officer.** A man is not a trespasser for taking possession of his own goods, if he does so peaceably; and when he does so acquire the possession of his own property, the fact that it had, before then, been levied on by the sheriff, by virtue of an execution, or taken on a writ of replevin, to which he was not a party, will not render him liable as a trespasser; nor would replevin lie against him for the possession of his property so taken.³ When, therefore, goods which had been levied on by the sheriff came peaceably to the possession of the owner, who was a stranger to the execution, and they were retaken from him by the sheriff, he was

6 Binn. 4; *Spring v. Bourland*, 6 Eng. (Ark.) 658; *Watson v. Todd*, 5 Mass. 271; *Mulholm v. Cheney*, Addis, (Pa.) 301; *Goodheart v. Bowen*, 2 Bradw. (Ill.) 578; *Badlam v. Tucker*, 1 Pick. 389; *Brownell v. Manchester*, 1 Pick. 234; *Milliken v. Selye*, 6 Hill, 623; *Squires v. Smith*, 10 B. Mon. 33. Though trover or trespass was permitted. *Cromwell v. Owings*, 7 Har. & J. 55.

¹ *Clark v. Skinner*, 20 John. 468; *Tison v. Bowden*, 8 Fla. 70; *Gardner v. Campbell*, 15 John. 401; *Chinn v. Russell*, 2 Blackf. 172.

² *Hunt v. Pratt*, 7 R. I. 283; *Gibson v. Jenney*, 15 Mass. 205; *Foss v. Stewart*, 14 Maine, 312; *Bean v. Hubbard*, 4 Cush. (Mass.) 85; *Deyo v. Jenkinson*, 10 Allen, 410; *Leavitt v. Metcalf*, 2. Vt. 343; *Haskill v. Andros*, 4 Vt. 609; *Mulholm v. Cheney*, Addis, (Pa.) 301; *Stone v. Bird*, 16 Kan. 488.

³ *Spencer v. McGowen*, 13 Wend. 256; *Sims v. Reed*, 12 B. Mon. (Ky.) 51; *Wood v. Hyatt*, 4 John. 313; *Hyatt v. Wood*, 4 John. 150; *Merritt v. Miller*, 13 Vt. 416; *Barnes v. Martin*, 15 Wis. 240; *Marsh v. White*, 3 Barb. 518; *Kunkle v. State*, 32 Ind. 220; *Bills v. Kinson*, (1 Fost.) 21 N. H. 448.

entitled to sustain replevin for their recovery.¹ This is but an application of the well-known rule, that an officer, taking possession of goods by virtue of process, must keep possession. A voluntary surrender releases the levy.

§ 247. **Replevin does not lie for goods in the hands of a receiver of court.** Property in the hands of a receiver of court, duly appointed to take charge of that property, is in the custody of the law, and cannot be seized upon execution or attachment, or replevied without permission of the court by whose appointment it is held. It is for the time in the custody of the court, to be disposed of as the law directs.² But when the receiver assumes to hold property not included in the decree, and to which the debtor never had any title, with respect to such goods he is not regarded as an officer, but as a trespasser, and the rightful owner can sue him in any appropriate form of action, either for the property or for damages.³ The more appropriate course would be to apply to the court under whose authority the receiver assumes to act, and upon a showing of the facts the court will unquestionably make such order as would fully protect the rights of the claimant; and if he show himself to be the owner, the court will, without doubt, order the property to be surrendered.⁴

§ 248. **Does not lie at the suit of a defendant in execution against the sheriff.** By the common law, and by a provision existing in the statutes of all, or nearly all, the States, a defendant in an execution or attachment cannot sustain replevin for goods which have been taken from him by virtue of process to which he is a party defendant, unless the property is by statute exempt from seizure.⁵ So, when the mortgagee of

¹ *Hall v. Tuttle*, 2 Wend. 476.

² *Wiswall v. Sampson*, 14 How. 52; *Noe v. Gibson*, 7 Paige, 515; *Robinson v. Atlantic & Gt. W. Ry.*, 66 Pa. St. 160; *Parker v. Browning*, 8 Paige, 388.

³ *Hills v. Parker*, 111 Mass. 510; *Paige v. Smith*, 99 Mass. 395; *Leighton v. Harwood*, 111 Mass. 67.

⁴ *Parker v. Browning*, 8 Paige, 388; *In re Vogle*, 7 Blatchf. 19.

⁵ *Hopkins v. Drake*, 44 Miss. 622; *Yarborough v. Harper*, 25 Miss. 112; *Dearmon v. Blackburn*, 1 Sneed. (Tenn.) 390; *Wilson v. McQueen*, 1 Head,

chattels brought replevin against the sheriff for seizing the mortgaged property on execution against the mortgagee, it appeared that the judgment and execution was against both the mortgageor and mortgagee, in such case neither could sustain replevin against the officer.¹

§ 249. **Nor at the suit of a grantee of such defendant after the seizure.** Neither can a grantee of such defendant, after the goods were seized, sustain the action, as he occupies no better position than the defendant.² The rule may therefore be stated as general, that when goods, not exempt by law, are taken from the possession of the defendant named in the process, by virtue of an execution regular on its face, replevin will not lie at the suit of such defendant.³

§ 250. **The reason for the rule.** The reason for this rule is apparent when it is considered that if the defendant were permitted to maintain replevin, it would be in his power to prolong and perhaps defeat a valid claim, upon which he has had a full opportunity to make his defense when judgment was rendered against him; and this would produce delay in the execution of a process which is final in its nature. Statutory provisions exist in some States which permit the replevying of property attached, but such proceedings are a part of the attachment suit, and are not affected by any of the ordinary rules in this action.⁴

§ 251. **Qualifications of the rule.** The execution, however, must be a valid one, and issued by competent authority, as an execution void on its face is no justification.⁵ Also, in case

(Tenn.) 19; Orner v. Hollman, 4 Whart. (Pa.) 45; Kellogg v. Churchill, 2 N. H. 412; Ilsley v. Stubbs, 5 Mass. 280; Morris v. DeWitt, 5 Wend. 71; Melcher v. Lamprey, 20 N. H. 403; Perry v. Richardson, 9 Gray, 216.

¹ Talbot v. De Forest, 3 G. Greene, (Iowa,) 586.

² Hines v. Allen, 55 Me. 115; Gardner v. Campbell, 15 Johns. 401; Dunham v. Wyckoff, 3 Wend. 280; Shaw v. Levy, 17 S. & R. (Pa.) 102.

³ Hall v. Tuttle, 2 Wend. 478; Judd v. Fox, 9 Cow. 262; Ilsley v. Stubbs, 5 Mass. 283; Thompson v. Button, 14 John. 84; Gardner v. Campbell, 15 Johns. 402; Mills v. Martin, 19 Johns. 32; Shaddon v. Knott, 2 Swan, (Tenn.) 358.

⁴ Green v. Holden, 35 Vt. 315. The Kentucky reports contain many cases of this nature.

⁵ White v. Jones, 38 Ill. 165; Campbell v. Williams, 39 Iowa, 646.

the levy is void or wrongful, for any misconduct of the officer, the defendant in the process may take advantage of the error, and bring replevin as though he was a stranger to it. When the levy was made on Sunday, the statute of the State forbidding service on that day, the levy was held void, and the defendant in the process was permitted to sustain the action.¹ Or where a constable who has no authority to execute a particular process attempts to make a levy, the levy is void.² These cases are all based upon the principle that the taking, though under color of legal process, was wrongful, and afforded no protection to the officer, even when suit was brought by the defendant named in the process.

§ 252. Does not lie for liquors seized under an act to prevent the sale of intoxicating beverages. The protection which the law affords to property in its custody is governed by rules which will be best understood by illustrations, the principles which underlie all these being substantially the same, to-wit: That when the law has assumed control of property for the purpose of disposing of it between disputing claimants, it will not suffer it to be withdrawn from its custody until final disposition has been made by the court. Where liquors had been seized, and were awaiting the action of the court, under a process looking to their condemnation under a statute forbidding intoxicating liquors to be kept or sold, they could be replevied by the owner,³ and the court properly dismissed the action, on motion. Even if the defendant had proved that he had the liquor for the lawful purpose of making vinegar, it would have been no defense as against the motion to dismiss. If the defendant's purpose was lawful, that fact could be made to appear in the original proceeding, but the court would not allow property so seized to be withdrawn from its custody at the suit of the owner, until it had passed on the question of the seizure. The same rule was applied in New Hampshire, where liquors, having been illegally kept, had become a nuisance, and were seized by an officer under a warrant to

¹ Peirce v. Hill, 9 Porter, (Ala.) 151.

² Conner v. Palmer, 13 Met. 302.

³ Funk et al. v. Israel, 5 Iowa, 450; Monty v. Arneson, 25 Iowa, 383.

seize and keep them until final action of the court. They were regarded as in the custody of the law, and not subject to be taken upon a writ of replevin.¹ These cases proceed upon the ground that when a seizure has been made by an officer in the execution of his duty, the courts will retain the possession of the property pending the inquiry into the propriety of the seizure, and will not suffer a claimant to withdraw the property under pretense that he desires to contest the seizure.

§ 253. Where the seizure was under an ordinance which had been declared void. But where liquors were seized under a town ordinance for the suppression of the sale of intoxicating liquors, and the ordinance had been held void by a court of competent jurisdiction, the owner brought replevin and recovered.²

§ 254. Does not lie for cattle legally impounded. The action does not lie against a pound master for cattle legally impounded, so long as he retains them in the custody of the law; but when he removed them from the lawful pound and put them in his own pasture or barn, and the owner finding them there took them, and the pound master re-took them; *held*, that the pound master had lost his legal custody and the owner could recover.³ This, however, will not preclude the owner from testing the legality of the seizure and impounding of his cattle in this action. If the owner, in such a case, can show the seizure or detention to be illegal, for example, suppose the pound master should refuse to deliver the cattle upon demand after payment of all dues; replevin would unquestionably be a proper remedy.

§ 255. Lies for powder seized under an ordinance prohibiting its introduction in large quantities into a city. Although the common council of a city may pass an ordinance prohibiting the bringing of powder in large quantities into the city, and though it may impose a penalty for the violation, or may compel the removal of the powder, such an ordinance will not

¹ *State v. Barrels of Liquor*, 47 N. H. 374. So in *Massachusetts, Allen v. Staples*, 6 Gray, (Mass.) 491.

² *Sullivan v. Stephenson*, 62 Ill. 297.

³ *Bills v. Kinson*, 1 Fost. (21 N. H.) 449; *Cate v. Cate*, 44 N. H. 211.

justify the council in declaring the powder forfeited or withholding the possession from the owner, who may bring replevin if it be withheld from him.¹

§ 256. Does not lie for property taken on a writ of replevin until after the former case is decided. When an officer has taken property by virtue of a writ of replevin for the purpose of delivering it in obedience to the mandate, he is regarded as holding it in the custody of the law, and it is not liable to any other replevin from him.² One of the reasons which seems to govern in such cases is that the writ of replevin commands the officer to seize the identical property and make a particular disposal of it; and while the officer is acting in obedience to that command the law will not permit any other party to interfere and prevent him from doing what the writ directs him to do.³

§ 257. The distinction between a writ of replevin and an execution, or attachment. There is a marked distinction to be observed between goods taken by an officer on an execution, or attachment, and goods taken on a writ of replevin. In the latter case the identical goods are in the custody of the law, and are before the court to be disposed of as it shall see proper; and the proceeding is so far *in rem* that the goods cannot be seized upon any process until the court shall have taken action. If, therefore, a party finds his goods in the hands of an officer upon a valid writ of replevin, and that they have been taken from the possession of the defendant named in the writ, his remedy is by an application to the court to be permitted to come in and set up his claim to them, and not by an independent replevin. Whereas, if goods are wrongfully seized by an officer upon execution or attachment it cannot be said to

¹ *Cotter v. Doty*, 5 Ohio, 395.

² *Contra*, see *Hagan v. Deuell*, 24 Ark. 216.

³ *Sanborn v. Leavitt*, 43 N. H. 473; *Lowry v. Hall*, 2 W. & S. (Pa.) 131; *Bell v. Bartlett*, 7 N. H. 188; *Maloney v. Griffin*, 15 Ind. 214; *Willard v. Kimball*, 10 Allen, 211; *Shipman v. Clark*, 4 Denio, 446; *Foster v. Pettibone*, 20 Barb. 350; *Stimpson v. Reynolds*, 14 Barb. 506; *Isley v. Stubbs*, 5 Mass. 280; *Morris v. De Witt*, 5 Wend. 71; *Rhines v. Phelps*, 3 Gilm. (Ill.) 455; *Spring v. Bourland*, 6 Eng. (Ark.) 658.

confer any lien on them, or to bear any resemblance to a proceeding *in rem*.¹

§ 258. **Cross-replevins not allowed.** Instances have occurred where the defendant in replevin has sought to forestall the action by another replevin at his own suit for the same goods. This is in the nature of a cross-replevin, which the law does not permit.² Neither can a grantee of the defendant, after suit brought. The rights of all parties can be determined in the first action. This is now a statutory provision in many States.³

§ 259. **The same. Illustration.** A. replevied property and obtained possession of it without there being service on defendants. The proceeding, except the issue of the writ, was set aside by the court. The defendant in first suit sued out replevin against plaintiff for same property; defendant in the second suit pleaded general issue (*non cepit*), and gave notice that *he would prove* the pendency of the first suit, etc. *Held*, that as the proceedings in the first suit were set aside, that taking was the same as though it had been without any writ, and in such case the second replevin, though by the defendant from the plaintiff in the former suit, is not a cross-replevin.⁴

§ 260. **The sheriff charged with the execution of process must obey it at his peril.** It is an old and well established rule that a sheriff charged with the execution of a process

¹ *Watkins v. Page*, 2 Wis. 95. Property in the hands of the sheriff by virtue of a writ of replevin is in the custody of the law and is not liable to a second distress. *Milliken v. Seyle*, 6 Hill, 623; *Gilbert v. Moody*, 17 Wend. 358; *Lovett v. Burkhardt*, 44 Pa. St. 174.

² *Hagan v. Deuell*, 24 Ark. 216; *Powell v. Bradlee*, 9 Gill & Johnson, 220; *Shaw v. Levy*, 17 Serg. & R. 103; *Maloney v. Griffin*, 15 Ind. 213; *Dearmon v. Blackburn*, 1 Sneed, (Tenn.) 390. When property is taken by writ of replevin the defendant cannot retake it by second writ while the first is pending. *Isley v. Stubbs*, 5 Mass. 280; *Morris v. De Witt*, 5 Wend. 71; *Sanborn v. Leavitt*, 43 N. H. 473; *Belden v. Laing*, 8 Mich. 503; *Clark v. West*, 23 Mich. 243; *Lowry v. Hall*, 2 W. & S. (Pa.) 131; *Hagan v. Deuell*, 24 Ark. 216.

³ *Hines v. Allen*, 55 Me. 115. A second suit brought by the defendant in the first suit and his partner against the same plaintiff is a cross replevin. *Beers v. Wuerpul*, 24 Ark. 273.

⁴ *Smith v. Snyder*, 15 Wend. 324.

must obey its mandates at his peril. Where a writ of execution or attachment directs him to seize upon the goods of A. he must assume the responsibility of determining what goods belong to A.; and if he seize upon the goods of B. the writ is no protection to him in so doing, and he becomes liable to B. in trespass or replevin at his election¹ If the seizure was made with a deliberate wrongful intention on the part of the officer to seize the goods of one who was in no way connected with the writ, no one would for a moment attempt to justify such a seizure; and if it was made by mistake it would be equally absurd to contend that the blunder of an officer could deprive the real owner of his goods, or of any of his rights in them.² Even when the officer does not remove articles, a levy by him may become a trespass as against the real owner, and render him liable under that action; or the owner may, if a stranger to the process, maintain replevin, provided his possession is taken from him.³

§ 261. **The same.** This question was considered in a late case in Illinois, where plaintiff in attachment, who had prosecuted his suit to judgment, asked a process against the sheriff to compel him to sell the attached property. The sheriff replied that it had been taken from him by a writ of replevin, describing it. "The question then occurs," said Mr. Justice SCHOLFIELD, in delivering the opinion, "is replevin a proper remedy against a sheriff who has levied a writ of attachment against one person upon the property of another, at the instance of the party whose property is thus wrongfully levied

¹ *Ackworth v. Kemp*, Doug. (Eng.) 40; *Ralston v. Black*, 15 Iowa, 47.

² *Stewart v. Wells*, 6 Barb. 79; *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Allen v. Crary*, 10 Wend. 349; *Shipman v. Clark*, 4 Denio, 447; *Hall v. Tuttle*, 2 Wend. 476; *Ilseley v. Stubbs*, 5 Mass. 280; *Phillips v. Harriss*, 3 J. J. Marsh, (Ky.) 121; *Caldwell v. Arnold*, 8 Minn. 265; *Bradley v. Holloway*, 28 Mo. 150; *Drake on Attachments*, § 223; *Brown v. Bissett*, 1 Zab. 21, (N. J. L.) 268. Where an officer improperly levies on property which does not belong to the defendant in his process, the owner may maintain replevin. *Gimble v. Ackley*, 12 Iowa, 27. See, also, *Phillips v. Harriss*, 3 J. J. Marsh, (Ky.) 124; *Smith v. Montgomery*, 5 Iowa, 370; *Wilson v. Stripe*, 4 Green. 551; *Miller v. Bryan*, 3 Iowa, 58; *L. & Portland Canal v. Holborn*, 2 Blackf. 267; *Chinn v. Russell*, 2 Blackf. 172; *Ralston v. Black*, 15 Iowa, 47.

³ *Gallagher v. Bishop*, 15 Wis. 276.

upon? It seems well settled that this remedy would be appropriate in such cases, aside from anything to be found in our statute."¹

§ 262. **Replevin lies for goods wrongfully sold by sheriff on execution.** Where the sheriff seizes and sells goods not the property of the defendant in execution, such sale passes no title to the purchaser, and the owner may sustain replevin against him; and, although it has been held that no demand is necessary, the safer way would be to make it before suit.²

§ 263. **Distinction between replevin for the goods and an action against the officer as a trespasser.** There is a distinction to be observed in this connection, between an action against the officer in trespass, and an action for the goods. An execution regular on its face, issued by a court of competent jurisdiction, will protect an officer in an action of trespass brought against him by the defendant named in the writ, but it cannot be made the basis of a claim of right to the property, without proof of a valid judgment to sustain it.³

§ 264. **Writ of replevin.** When and how far a protection to the officer serving it. A writ of replevin, valid on its face, is a perfect protection to the officer in taking the goods from the possession of the defendant therein named.⁴ That is, it affords the officer a definite and limited protection so long as he proceeds within the authority which the law confers upon him; but beyond that the law does not in any way shelter him.⁵ When, therefore, an officer, in pursuance of the command of a writ of replevin issued from a competent court and

¹ *Samuel v. Agnew*, 80 Ill. 554. See, also, *Ralston v. Black*, 15 Iowa, 48; *Chinn v. Russell*, 2 Blackf. 172; *Megee v. Beirni*, 3 Wright, (Pa.) 50; *Woodruff v. Taylor*, 20 Vt. 65; *Barber v. The Bank*, 9 Conn. 407; *Allen on Sheriff*, 272; *Gardner v. Campbell*, 15 John. 401; *Judd v. Fox*, 9 Cow. 259; *Louisville & Portland Canal Co. v. Holborn*, 2 Blackf. (Ind.) 267.

² *Hicks v. Britt*, 21 Ark. 422; *Coombs v. Gorden*, 59 Me. 111; *Crittenden v. Lingle*, 14 Ohio St. 182.

³ *Adams v. Hubbard*, 30 Mich. 104; *Underhill v. Reinor*, 2 Hilton, (N. Y.) 319; *Beach v. Botsford*, 1 Doug. (Mich.) 199; *Le Roy v. East Sag. Ry.*, 18 Mich. 233; *Earl v. Camp*, 16 Wend. 563.

⁴ *Clark v. Norton*, 6 Minn. 412; U. S. Dist. Court Western Dist. Tenn.; *Waddy Thompson, ex parte*, 15 Am. Law Reg. 522.

⁵ *Whitney v. Jenkinson*, 3 Wis. 408.

valid on its face, takes possession of the property, from the defendant named in the writ, he is not liable to the defendant, even though the latter may be the real owner of the property, and the replevin suit be determined in his favor. The failure of the plaintiff in replevin to make out his case cannot render the officer liable to the defendant in damages.¹ But the protection afforded the officer does not by any means extend to the party who has procured the writ to issue.²

§ 265. **Whether the writ authorizes a seizure of the goods from a stranger.** Whether the writ will protect the officer in taking the goods from the possession of one who is a stranger to it, is a question upon which there is some difference of opinion. The writ of replevin commands the officer to take certain articles which are particularly described. In case these articles are found in the hands of the defendant named in the writ, no question can arise; but if they are found in the hands of one who is not a party to the writ, but who has possession and claims to own them, the case presents more difficulties.³ In New York, before the code was passed, the form of the writ required the officer to take the property if it could be found in the county, and provisions were made for the arrest of the defendant in case the goods were not found. Under such a statute the officer was not liable as a trespasser for seizing the goods wherever found.⁴ But under a subse-

¹ Williard v. Kimball, 10 Allen, (Mass.) 211; Weinberg v. Conover, 4 Wis. 803; Shipman v. Clark, 4 Denio, 446; Stimpson v. Reynolds, 14 Barb. 506; Foster v. Pettibone, 20 Barb. 350; Watkins v. Page, 2 Wis. 97.

² *Ex parte* Waddy Thompson, 15 Am. Law Reg. 522.

³ The ancient case of Hallett v. Byrt, Carth. 380, says: "There is a difference between replevin and other process. In replevin the officer is expressly commanded to take property, but in an execution he is commanded to take the goods of the party, which the officer serving must do at his peril." S. C., 1 Ld. Raym. 218—Skinn. 674. (The several reports do not agree. I cite the report as in Carth.) This case has been cited and approved in many modern cases. Shipman v. Clark, 4 Denio, 447; Watkins v. Page, 2 Wis. 97; Spencer v. M'Gowen, 13 Wend. 256; Silsbury v. McCoon, 4 Denio, 332; Griffith v. Smith, 22 Wis. 647; Battis v. Hamlin, 22 Wis. 669; Foster v. Pettibone, 20 Barb. 350; Shaw v. Coster, 8 Paige, (N. Y.) 344.

⁴ King v. Orser, 4 Duer. 436. See Foster v. Pettibone, 20 Barb. 350; Shipman v. Clark, 4 Denio, 446. Consult Buck v. Colbath, 3 Wall. (U. S.) 334.

quent statute, it was held that an officer was not protected by a writ of replevin in taking property from a third person claiming to own it, even though the goods were the specific chattels which the writ directed him to take;¹ and this doctrine is fully sustained by subsequent cases.² Both these cases hold that the writ is no protection to an officer in taking goods from the possession of one not a party to it.

§ 266. **The same.** One of the best considered cases on this subject is found in Ohio. The conclusion there reached is, that an officer has no right to take goods described in a writ of replevin from the possession of a person not named in the process. It is important to observe, says the court, in substance, that while the rights of the defendant are sedulously guarded by a bond required from the plaintiff, no guard or protection is afforded to the rights of third persons, and that unlike proceeding strictly *in rem*, as in admiralty or chancery, where the officer is directed to take possession of specific property, that the rights of the several claimants may be ascertained, the property is not retained in the possession of the officer, but is delivered to the claimant, and no provision is made for third persons to come in and assert their claims.³ A very similar line of reasoning was followed in Maine, where the court held that replevin could only be maintained against the person having possession of the goods.⁴ But there is no authority for saying that bare possession, by a stranger, of the goods described in the writ ought to deter the sheriff from making the delivery, when it is apparent that they really belong to the defendant in the process. The sound discretion of the officer is called largely into use. If the property described in the writ has been recently in the hands of the defendant named, and he, for fraudulent purposes, puts it in the hands of another, in anticipation of the writ, and for the purpose of defeating it, such facts would probably go far to justify the officer in seizing the goods from such third party. If, however, the goods had

¹ *Stimpson v. Reynolds*, 14 Barb. 506.

² *Bullis v. Montgomery*, 50 N. Y. 353; *Otis v. Williams*, 70 N. Y. 208.

³ *State v. Jennings*, 14 Ohio St. 73.

⁴ *Ramsdell v. Buswell*, 54 Me. 546. See *Willard v. Kimball*, 10 Allen, 201.

never been in the possession of the defendant in the writ, but had for a long period been in the hands of another claiming to own them, the officer would unquestionably be justified in refusing to dispossess such third party under a writ in which he was not named, If he assume to serve the writ he must show that the goods were actually the property of the defendant named in his process,¹ and must take the risk of a suit for trespass, against which he ought, when his act has been in good faith, to be fully indemnified by the party in whose interest he acts.

§ 267. **Writ of retorno authorizes seizure only from the person named.** When a writ of *retorno* issues, the sheriff cannot take the property from any other person than the one named in the writ.²

§ 268. **Replevin lies for exempt property wrongfully seized.** There exists in many, if not all the States, statutory provisions exempting a certain amount in value of property, or certain specific articles, from levy and sale upon execution. As to such property, the rule is, that notwithstanding there may be a judgment and execution against the defendant, valid in all respects, and sufficient to authorize the seizure of property of the debtor not exempt; as to exempt property, he is by law privileged to retain it, notwithstanding the execution; and if an officer, disregarding such exemption, seize upon the property, the debtor may assert his right in replevin for the goods, or in an action against the officer for their value.³

¹ Hilliard on Torts, 194; *Crosby v. Baker*, 6 Allen, (Mass.) 295; *Commonwealth v. Kennard*, 8 Pick. 133; *Brush v. Fowler*, 36 Ill. 59; *Jansen v. Acker*, 23 Wend. 480; *Perkins v. Thornburg*, 10 Cal. 189.

² *Lear v. Montross*, 50 Ill. 509.

³ *Wilson v. McQueen*, 1 Head. (Tenn.) 17; *Bean v. Hubbard*, 4 Cush. 86. A non-resident cannot assert this privilege. *Newell v. Hayden*, 8 Iowa, 140; *Sims v. Reed*, 12 B. Mon. 53; *Moseley v. Andrews*, 40 Miss. 55; *Wilson v. McQueen*, 1 Head. (Tenn.) 16; *Elliott v. Whitmore*, 5 Mich. 532; *Wilson v. Stripe*, 4 G. Greene, (Iowa,) 551; *Lynd v. Pickett*, 7 Minn. 184; *Douch v. Rahner*, 61 Ind. 64. Dental tools held mechanical tools, and exempt as such. *Maxon v. Perrott*, 17 Mich. 333. Whether the articles claimed as tools are necessary as tradesman's tools, and for that reason exempt, is a question for the jury to determine. A judgment and order to sell exempt property is no bar to an action of replevin; but the replevin of the property will not avoid the judgment. *Wilson v. Stripe*, 4 G. Greene, (Iowa,) 551.

§ 269. **The aid of the statute must be invoked.** An officer with execution is not bound to consult with the execution debtor as to what property is exempt, but he may seize and proceed to sell any or all the debtor's property upon which he can lay his hands;¹ and if the debtor desires the protection of the statute, he must invoke its aid. It does not operate unless its shelter is sought. When exempt property is levied on, the debtor ought, at the time, or seasonably thereafter, to specially claim the benefit of the exemption; he cannot sustain replevin for property he has not selected and claimed as exempt.² So, when a certain amount of a particular kind of property is exempt, the debtor must select and claim, or in some lawful manner assert his rights. If the sheriff levy execution on the whole of that class of property, the debtor cannot sustain replevin until he select and demand the exempted portion.³ A waiver of exemption in favor of one creditor cannot be taken advantage of by another.⁴ Nor will a mortgage be a waiver of the right to claim property as exempt, except as against the mortgagee.⁵ Under a statute which exempts swine, the flesh of such swine, when killed and dressed, is also exempt.⁶ So of butter made from a cow which is exempt.⁷ But hay or grain exempted for the purpose of feeding domestic animals is not exempt unless the party claiming it has the animals.⁸

§ 270. **The exemption a personal privilege.** This exemption of property from forced sale on execution is a personal privilege, and must be exercised by the debtor personally, or it will be regarded as waived.⁹ In replevin against the sheriff, the plaintiff claimed a span of horses, by purchase from B. The sheriff

¹ *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

² *O'Donnell v. Seger*, 25 Mich. 371; *Seaman v. Luce*, 23 Barb. 240. As to the practice, see *Newell v. Hayden*, 8 Iowa, 140. But, see *Frost v. Mott*, 34 N. Y. 253.

³ *Tullis v. Orthwein*, 5 Minn. 377.

⁴ *Frost v. Mott*, 34 N. Y. 253.

⁵ *Reynolds v. Salee*, 2 B. Mon. (Ky.) 18.

⁶ *Gibson v. Jenney*, 15 Mass. 206.

⁷ *Leavitt v. Metcalf*, 2 Vt. 342; *Haskill v. Andros*, 4 Vt. 610.

⁸ *Foss v. Stewart*, 14 Me. 312.

⁹ *Bonsall v. Comly*, 44 Pa. St. 442; *Mickes v. Tousley*, 1 Cow. 114; *Earl v. Camp*, 16 Wend. 562.

replied that he had seized them on an execution against B., and that they were B.'s property. The plaintiff asked the court to instruct the jury that, "under the laws, one span of horses was exempt, and that if B. had no other horses than these, which were exempt, the defense of the sheriff would fail." The court properly refused the instruction. The exemption was the personal privilege of the debtor, and might be waived by him, and if so waived, it could not be asserted by another.¹

§ 271. **The same. Damages and costs in such cases.** While the rule which permits replevin for property by law exempt is supported by abundant authority, it has been said that neither damages nor costs should be awarded in such cases;² but this does not seem to rest on any well founded reason. The sheriff who willfully or ignorantly takes property in defiance of the law, should respond to the injured party in compensatory damages, at least.³

§ 272 **Jurisdiction in replevin, where goods have been wrongfully seized.** When goods have been wrongfully seized by an officer upon process, and the owner desires to contest the validity of the seizure, the question arises, in what court shall his suit be brought? There may be a court competent to take jurisdiction over the subject matter of the controversy, as well as the person of the defendant, within easy access; while the court from which the process issued, upon which the wrongful seizure was made, may be distant and difficult of access. Whether any exclusive jurisdiction attaches to this latter court may be a question of importance. There appears to be no good reason why the court issuing the process, behind which the officer assumes to shelter himself, should alone have jurisdiction in such cases. Upon process of attachment issued from the Superior Court of Cook County, the sheriff levied upon goods which were afterwards replevied from him by the owner, (who was not the defendant in the attachment,) upon a writ of replevin issued out of the Circuit Court of Cook County.

¹ *Howland v. Fuller*, 8 Minn. 50.

² *Saffell v. Walsh*, 4 B. Mon. (Ky.) 92.

³ *Pozzoni v. Henderson*, 2 E. D. Smith, 146; *Whitaker v. Wheeler*, 44 Ill. 447; *Livor v. Orser*, 5 Duer. 501.

The court said, "there is no apparent reason why, if the action of replevin might be brought in the Superior Court of Cook County, it might not, with equal propriety, be brought in the Circuit Court of that county, which is practically a branch of the same court."¹ The court, however, in this case, cites *Taylor et al. v. Carryl*, 20 How. (U. S.) 583, and *Freeman v. Howe*, 24 How. 450, and seems to recognize the doctrine that when goods are in the custody of the officer of a United States court, under its process, they cannot be taken by process from a State court.

§ 273. **The same.** The question stated. It is unquestionably the law, that when goods are rightfully in the custody of an officer of the United States court, under judicial process from such court, replevin will not lie to dispossess him; but where an officer assumes to take goods, in violation of the commands of his writ, he cannot be said to take them by virtue of the process of the court. On the contrary, all the authorities agree that an officer so holding is a trespasser. His holding is, in fact, a disobedience of the mandate of the court, and he is personally liable to the injured party. This presents the question, as to whether a party whose property has been wrongfully taken by an officer of the United States, on process from a federal court, can employ the officers and process of the State courts to recover it.

§ 274. **The rule in Freeman v. Howe.** The leading case on this subject is *Freeman v. Howe*, which originated in a State court in Massachusetts, and was subsequently passed upon by the Supreme Court of the United States. Process of attachment in a suit for debt was issued from a United States Court to its marshal, commanding him to attach the property of the Vermont & Massachusetts R. R. Co. Upon that process the marshal seized upon thirteen cars, which were afterwards replevied upon a writ issued from a State court in Massachusetts. Upon the trial, the marshal contended that the property was taken by him under process from the United States court, and that replevin in a State court would not lie. DEWEY, J., in delivering the opinion of the appellate court in Massachusetts,

¹ *Samuel v. Agnew*, 80 Ill. 554.

said: "These articles were not seized for the purpose of being proceeded against in the courts of the United States by any proceeding *in rem*. They were not the subject of the case then to be tried. The process from the United States court was that usually issued for the recovery of a debt, unaccompanied by any lien or charge upon the goods, except that resulting from an attachment to secure an alleged debt. The only process to the marshal was one commanding him to attach the property of the Vermont & Massachusetts R. R. Co.; not a warrant to seize these cars." And upon this reasoning the court held that replevin in a State court, by the real owner, against the marshal, was proper.¹ The case, however, went to the United States Supreme Court, and the decision of the State court was reversed; the reversal being placed upon the ground that the right of the defendant, the marshal, to hold the goods was a question belonging to the federal court, under whose process they were seized, and that there was no authority in an officer, under process issued from a State court, to interfere with property which had been seized by a marshal under process from a United States court.²

§ 275. **The doctrine in this case considered.** This decision has not provoked the discussion which it would certainly have occasioned had it been a similar opinion from any other court. The bare authority of the Supreme Court of the United States being a sufficient reason for avoiding all question as to its correctness. The reasoning has, nevertheless, been criticized in a number of cases in the State courts, and explained at least once in the United States Supreme Court. Mr. Justice PAINE, of Wisconsin, remarks, "that the conclusions of the court, (in *Freeman v. Howe*,) do not appear to be based upon any effect given to any provision of the constitution or laws of the United States, so that its decision would not, according to the prevailing opinion, be binding in the State courts; but it seems to rest upon grounds of comity." And while the doctrine in that case is followed,³ it is with doubt and misgiving as to the

¹ *Howe v. Freeman*, 14 Gray, (Mass.) 572.

² *Freeman v. Howe et al.*, 24 How. (U. S.) 450.

³ *Kinney v. Crocker*, 18 Wis. 79 See *Buck v. Colbath*, 7 Minn. 310.

correctness of the principle. In Minnesota, in replevin from a United States marshal, the answer of the marshal denied the plaintiff's right, and set up that the defendant, a United States marshal, held a valid writ of attachment against the goods of L.; that he levied on the goods as the property of L. and that they were his property, and demanded a return. To this plea there was no answer, and the court said the case stands admitted for want of an answer. The court, in delivering its opinion, cited the case of *Freeman v. Howe*, and said: "If we understand this decision, it is based upon the sole ground that one court cannot take the property from the custody of another by replevin, or any other process; for this would produce a conflict extremely embarrassing to the administration of justice. Whether this evil may be greater than that of always compelling a party to resort to the court out of which the process issued, upon which his property has been seized, to assert his legal rights, may well be questioned. * * * It cannot be denied but that there are expressions and statements in the opinion in *Freeman v. Howe* which would lead to the conclusion that the court in that case reversed the decision of the State court upon the ground that the State court had not jurisdiction of the case, but we think not. * * * Conceding, therefore, the correctness, or, at least, the binding force of the decision in *Freeman v. Howe*, we think the judgment must be for a return."¹

§ 276. **The same.** The same court had the question before it again, where it employed the following reasoning: "If there is any principle of law which may be considered as settled by a long series of uniform decisions, it is, that he, whether an officer of the law or otherwise, who takes the property of another without authority, is a wrong-doer, and the taking is wrongful. * * * The only approach to any innovation upon this rule, so far as we are aware, by the courts of this country, is the case of *Freeman v. Howe*, 24 How. (U. S.) 450. Even though the officer acted upon the fullest knowledge and information obtainable, as to the ownership of the property, and that he fully and honestly believed, and had

¹ *Lewis v. Buck*, 7 Minn. 104.

good reason to believe, that the property was the property of the defendant, and that he was in duty bound to levy on it, it is no defense. The law has not left the rights of property and the protection afforded thereto to depend on the mere belief or good faith of the officer holding process; nor will his good faith protect him from the consequences of his illegal acts. The sheriff, when he levies on property, must do so at his own risk, and if he seizes property not authorized by his process, he is a trespasser.”¹ In Wisconsin, the doctrine was distinctly stated, that when property exempt from seizure by the laws of the State, was seized by a United States officer, for debt, replevin would lie in the State court. It was claimed in this case that the horses were taken and held by virtue of an execution issued out of the District Court of the United States, and hence were in the custody of the law. “But how could they be in the custody of the law unless the marshal had a lawful right to take them into his custody? The idea that an unlawful custody of property can be the custody of the law is absurd.”²

§ 277. **The same.** While the case of *Freeman v. Howe* may be regarded as a decision of this question by the court of the last resort, the reasoning of the court and the conclusions arrived at do not produce that conviction of the soundness of the doctrine laid down which usually follows the opinion of that eminent tribunal. It seems to be in conflict with the earlier case of *Slocum v. Mayberry*, 2 Wheat. 2. It is difficult to see where any material inconvenience would follow the enforcement of a contrary rule; while it is apparent that the practical operation of the rule as laid down is to permit an officer with process of execution or attachment against A. either ignorantly or willfully to seize on the goods of B., and to compel the real owner to submit to their loss, or be at the vexation and expense of a resort to a distant court.

¹ *Caldwell v. Arnold*, 8 Minn. 265.

² *Gilman v. Williams et al.*, 7 Wis. 329. See the case of *Booth v. Ableman*, which appeared in 16 Wis. 463, and again in 18 Wis. 496, and in 20 Wis. 23 and 633; *Ward v. Henry*, 19 Wis. 77; *Weber v. Henry*, 16 Mich. 399; *Hanna v. Steinberger*, 6 Black, 521.

§ 278. *The same.* From the time of the case of *Hallet v. Byrt*, Carth. 380 (A. D. 1687), until the present day, the courts have, without an exception (unless it be in *Freeman v. Howe*), sustained the doctrine promulgated in that ancient case, that where the sheriff by process of execution or attachment is directed to levy on the goods of the defendant in the process, and this he must do at his own peril, not at the peril of the owner of the goods. Another and serious embarrassment which seems to grow out of the enforcement of the rule as laid down in the case of *Freeman v. Howe*, is that it draws into the Federal courts all litigation in respect to the title to property attached by the United States Marshal, though between strangers to the attachment suit and although involving the adjudication of mere legal claims between citizens of the same State, which the Constitution designed to exclude from Federal jurisdiction.

§ 279. *The same.* *Slocum v. Mayberry*, 2 Wheat. 2, was a case where a ship was seized for a suspected violation of law; the cargo was taken with the ship and detained by the United States officer; the owner of the cargo brought replevin in the State court of Rhode Island, and was sustained by the United States Supreme Court. Chief Justice MARSHALL, delivering the opinion of the court, said: "The cargo remained in the custody of the officer because it had been placed on a vessel in his custody, but no law prevents it being taken out of the vessel. The owner has the same right to his cargo that he has to any other property, consequently he may demand it from the officer in whose possession it is, that officer having no legal right to withhold it from him; and if it be withheld he has a right to appeal to the laws of his country for relief. The acts of Congress neither expressly nor by implication forbid the State court to take cognizance of suits instituted for property in the possession of an officer of the United States, not detained under some law of the United States, consequently the jurisdiction remains. Had the replevin been for the vessel, which was detained by the authority of the law of the United States, the case would have been entirely different."

§ 280. **The same.** Chancellor KENT lays down the law that if a marshal of the United States, under an execution against A., should seize the property of B., then the State courts have power to restore the property so illegally taken.¹ This statement is, in the opinion of *Freeman v. Howe*, 24 How. 459, said to be "an error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the Federal courts." But the opinion of Chief Justice MARSHALL, in the case before cited, seems in substantial principles to sustain the statements of the chancellor. *Davidson v. Waldron*, 31 Ill. 121, was an action of trover, where Davidson, with others, sought to recover the value of lumber which he alleged was levied upon by himself as United States Marshal. The defendants resisted on the ground of the insufficiency of the levy, and this was objected to by Davidson on the ground that the validity of the levy could not be enquired into in the State court; but the court said that the remedy was sought by the party as an individual, not as an officer of court. "There is no principle of law which renders writs issued by United States courts, or the acts of officers claiming to act under such writs, invulnerable to criticism in the State courts." And this appears to offer a solution of the question. An officer of the United States court ought not to have any special privilege to commit trespass.

§ 281. **The same.** *Buck v. Colbath*, 3 Wal. (U. S.) 334, was an action of trespass originally begun in a State court in Minnesota. The defendant pleaded that he was a United States Marshal for the District of Minnesota; that a writ of attachment came to his hands, and that he levied on goods, for the taking of which he was sued by Colbath, but he did not in his plea *aver* that the goods were the property of the defendant in the attachment. The plaintiff had judgment in the State court, and the case was taken to the United States Supreme Court, under Sec. 25, of the judiciary act of the United States. Mr. Justice MILLER, in delivering the opinion of the latter court, says: "The decision in *Freeman v. Howe*, took the profession generally by surprise, overruling as it did,

¹ 1 Kent Com. 410, citing *Slocum v. Mayberry*, *supra*.

the unanimous opinion of the Supreme Court of Massachusetts, as well as the opinion of Chancellor KENT." The court, however, follows the doctrine in *Freeman v. Howe*, alleging as a reason, that a departure from the rule in that case would lead to the utmost confusion and endless strife. The court further says substantially, that property may be seized by an officer of court under a variety of writs. These may be divided into two classes: 1st, Those in which the process or order of the court describes the property to be seized and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts by which the *res* is brought before it for its action. 2d, Those in which the officer is directed to levy the process on the property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any particular property to be thus taken. Of this class are the writ of attachment, or other mesne process, by which the property is seized before judgment, and the final process of execution, *elegit*, or other writ by which an ordinary judgment is carried into effect. It is obvious, on a moment's reflection, that the claim by the officer executing these writs to the protection of the courts from whence they issue, stand upon very different grounds in the two classes. In the first class, he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property. And if the court had jurisdiction, and the process was valid on its face, and the officer had kept himself within the mandatory clause of the writ, it is a complete protection in all courts. In the other class of cases, the officer has a large and important field for the exercise of his discretion. 1st, In determining that the property on which he proposes to levy is the property of the person against whom the writ is directed. 2d, That it is subject to levy, etc. So where the action was trespass in the State court against the Marshal for wrongful levy of an attachment issued from the Federal courts, the court said there was nothing in the fact that the writ issued from the Federal court, to prevent

the Marshal from being sued in the State court for his own tort for levying on property of a person not named in the writ. Among courts of concurrent jurisdiction, that one which first obtains jurisdiction has the exclusive right to decide every question in the case, but this only extends to suits between the same parties or persons seeking the same relief, and does not affect the parties so far as other and distinct relief is concerned, nor does it affect strangers to the proceeding.¹

§ 282. **The same.** Apart from the eminent authority of the cases in conflict with the doctrine laid down in *Freeman v. Howe*, 24 How. 450, the principles of the law which have been recognized since the earliest consideration of this question, warrant the conclusion that where an officer with process commanding him to take the goods of A., does with a willful and deliberate purpose of oppression, take the goods of B., the writ is no protection to him in his willful trespass; or, where an officer with such process ignorantly or carelessly levies on the property of a stranger to the writ, it affords him no justification, or confers any right or title to the property. That in either of these cases, the outraged owner may proceed against the wrong doer personally, and in such case he cannot plead license from any court whose authority he has abused and whose mandate he has disobeyed. The principles gathered from these cases seem to be in conflict, but the task of harmonizing them must be left to future consideration of the courts. Whether the State courts will feel bound to follow the ruling of the United States court upon this question, which does not involve the construction of the Constitution, or any of the laws of the United States, is a question upon which different courts will be likely to entertain different views.²

§ 283. **The power, duty and responsibility of the sheriff in serving the writ of replevin.** The responsibilities of the sheriff in serving the writ of replevin are considerable, and with

¹ *Buck v. Colbath*, 3 Wall. (U. S.) 334.

² *Kinney v. Crocker*, 18 Wis. 79; *Bruen v. Ogden*, (11 N. J. L.) 6 Halst. 371.

the responsibility imposed, the law gives a corresponding authority to be exercised by the officer in his own protection. An officer has immunity for acts done in the proper discharge of his duty in executing legal process, but when he attempts to execute illegal process, or legal process in an illegal manner, it affords him no protection.¹

§ 284. He must see that the writ is in form. An officer who assumes to act under color of authority of law, must take the responsibility of determining whether the law has given him the authority which he assumes to exercise. Thus, an officer is not justified in executing an order or process which is void on its face, or which the court has no jurisdiction to issue.² Neither has he a right to execute process, however legal or formal it be, in any other than a legal manner; as when the statute forbids service on Sunday, he would have no lawful authority to execute process on that day.³ It therefore becomes the duty of the officer in receiving a writ of replevin to see that it is substantially in legal form. If for any defect on its face it is void or inoperative, he will be liable as a trespasser or may be liable for the value of the goods, if he proceed to execute it.⁴

§ 285. And that it issues from a court of competent jurisdiction. The officer must also decide whether the court had jurisdiction to issue the writ. This by no means requires him to inquire whether the court acted properly in issuing the writ, for that question is entirely beyond his right to determine. Neither is he called upon to determine the rights of the parties, or whether the writ was properly issued or not. If the process be formal and sufficient on its face, and if the court from whence it issued had jurisdiction to issue such a

¹ *Driscoll v. Place*, 44 Vt. 258. If an officer levy an execution after the return day has expired, he is a trespasser. *Vail v. Lewis*, 4 Johns. 450. Consult *Dynes v. Hoover*, 20 How. 65; *Wise v. Withers*, 3 Cranch. U. S. Sup. Ct. 331; *Brown v. Compton*, 8 Term. R. 424; *Davison v. Gill*, 1 East. 64.

² *Leadbetter v. Kendall*, Hempst. (U. S. C. C.) 302; *Brown v. Compton*, 8 Term. R. 424 and 231; *Dynes v. Hoover*, 20 How. (U. S.) 65; *Wise v. Withers*, 3 Cranch, (U. S.) 331.

³ *Peirce v. Hill*, 9 Porter, (Ala.) 151; *Allen v. Crary*, 10 Wend. 349.

⁴ *Dame v. Fales*, 3 N. H. 70.

writ, it will be a complete protection to him, acting in obedience to its commands, so long as he acts within the scope of his legal duties and for the purpose of obeying its commands. He is to employ sufficient force to execute its mandates.¹ But if he have knowledge *aliunde* of the want of jurisdiction and persists in executing the writ notwithstanding, he will be liable.² Or where, from the circumstances of the case appearing on the face of the paper, the officer can see that there may be cause to suspect that process apparently formal has been improperly issued, he ought to examine into the matter to see that it is regular before serving it.³ As where under the statute an execution must issue within one year after judgment is rendered, without which a subsequent execution is void.⁴ A judgment was rendered in 1863 and no execution issued thereon until 1869, when execution was issued and returned *nulla bona*, and a transcript afterwards taken to the circuit court and another execution issued thereon. The latter execution was held no protection to the officer.⁵ The officer should examine the description of the property in the writ, and if it be so uncertain that he cannot distinguish the property, or if the property shown him be essentially different from the goods described, he may refuse to serve the process.⁶ It does not follow that the writ which may be sufficient to protect the officer, will also afford the same justification to the party.⁷

§ 286. The writ does not authorize a seizure of goods from the person of the defendant. When the defendant is wearing a watch, or other article, either of ornament of apparel, the writ would confer no authority on the officer to seize it

¹ *Fulton v. Heaton*, 1 Barb. (N. Y.) 552; *Ela v. Shepard*, 32 N. H. 277; *Colt v. Eves*, 12 Conn. 251; *Young v. Wise*, 7 Wis. 128; *Sprague v. Birchard*, 1 Wis. 458; *McLean v. Cook*, 23 Wis. 365; *Bogert v. Phelps*, 14 Wis. 88; *Landt v. Hiltz*, 19 Barb. 283; *Earl v. Camp*, 16 Wend. 563; *Dominick v. Eacker*, 3 Barb. 17; *Bagnall v. Ableman*, 4 Wis. 163.

² *Sprague v. Birchard*, 1 Wis. 457; *Grace v. Mitchell*, 31 Wis. 539; *Colt v. Eves*, 12 Conn. 243.

³ *Bacon v. Cropsey*, 3 Seld. 195.

⁴ *Morgan v. Evans*, 72 Ill. 586, and cases cited.

⁵ *Hay v. Hayes*, 56 Ill. 343.

⁶ *De Witt v. Morris*, 13 Wend. 495.

⁷ *Brown v. Bissett*, 1 Zab. 21, (N. J.) 46.

from his person, even when worn for the purpose of keeping it from such seizure, the person of the defendant being free from molestation upon process of this nature.¹

§ 287. **The right of an officer to break and enter a dwelling to take goods.** The question as to whether an officer has a right to break and enter the dwelling of the defendant to serve a writ of replevin seems to present itself here. Under the ancient common law the right and duty of the officer was unquestioned. A man's house was his castle, and would protect his person or his goods from seizure on civil process, but the wrongful taking of the goods of another was looked upon as little better than robbery,² and the safeguards thrown around a dwelling house would not privilege the owner to take or keep the goods of another. The Statute Westminster 1, Chapter 17, expressly directed the sheriff to break and enter a dwelling house or stronghold to make replevin of goods therein wrongfully detained. Authorities in modern times upon this question are meager, but it has been held that the sheriff had a right to enter the defendant's house to search for goods described in a writ of replevin, and that the legality of his entry did not depend on the fact of his finding the property therein. The court said, "It would be strange if the defendant, by secreting the goods, and thus adding to the wrongful taking, could have an action against the sheriff in coming to search for what he has good reason to suppose could be found there."³ A man's house is not a castle, nor does it carry any privilege but for himself. It will not protect a stranger who may fly there, nor will it protect the goods of another brought there to avoid a lawful execution.⁴

§ 288. **Parties bound to know the sheriff.** If an officer

¹ *Maxham v. Day*, 16 Gray, 213. Nor will an inn keeper be permitted to assert a lien on the garments which his guest is wearing on his person. *Sunbolp v. Alford*, 3 Mees & W. 249.

² *Gilbert on Rep.* 70; *Britton*, title Replevin.

³ *Kneas v. Fitler*, 2 S. & R. (Pa.) 265.

⁴ *Semaney's Case*, 5 Coke, 91. The sheriff may break and enter a barn or outhouse to serve an execution. See *M'Gee v. Given*, 4 Blackf. 18, note; *Haggerty v. Wilber*, 16 Johns. 287. See cases cited in *State v. Smith*, 1 N. H. 346.

serves the writ in person all parties are bound to know and recognize him. So, doubtless, of a regularly appointed deputy; but if the sheriff appoint a special deputy, though his power and authority is the same as the sheriff to serve that process, yet he would be obliged to show his authority, if it were questioned, as the defendant is under no obligation to recognize him without it.¹

§ 289. **Duty of the sheriff to take bond; his liability in respect to the bondsmen.** The law required the sheriff to take bond from the plaintiff, with two securities, conditioned that he would duly prosecute the suit, or make return, etc., and held the sheriff responsible for the solvency of these securities; not only that they were solvent when accepted by the sheriff, but that they should continue so down to the time when they should be legally called upon to make good the conditions of their bond.² The harshness of this rule has been greatly modified of late. And so far has the change in this direction been carried in many of the States that the statute provides a method by which the defendant may except to the bondsmen of the other party within a limited time, and in case of failure to do so within that time he is precluded from doing so afterwards.³ And the sheriff is not liable unless a formal exception is sustained.⁴ But if the securities fail to justify when excepted to, the sheriff is liable.⁵

§ 290. **Extent of the sheriff's liability.** The question has arisen as to the extent of the sheriff's liability; whether it is limited by the amount of the bond, or whether, in case the real damage sustained exceeds that amount, the sheriff should be held for the real damages. The penalty in the bond,⁶ where the suit is for taking insufficient security, is usually the limit

¹ *Burton v. Wilkinson*, 18 Vt. 186. See, also, *Alexander v. Burnham*, 18 Wis. 200; *State, etc., ex rel. v. Williams*, 5 Wis. 308, and note to new ed. p. 631.

² *Grant v. Booth*, 21 How. Pr. Rep. 354.

³ *Clinton v. King*, 3 How. Pr. Rep. 55; *Weed v. Hinton*, 7 Hill, 157; *Burns v. Robbins*, 1 Code R. 62.

⁴ *Wilson v. Williams*, 18 Wend. 581.

⁵ *Hoefheiner v. Campbell*, 1 Luc. (10 Mod.) 157.

⁶ *Evans v. Brander*, 2 H. Bl. 557; *Jeffrey v. Bastard*, 4 Ad. & E. 823.

of damages. But where the sheriff fails to take any bond, or takes bond in a sum less than double the value of the property, the injured party may unquestionably recover the real damages he has sustained.¹ By statutes in some of the States, the clerk, not the sheriff, takes the security, which may be excepted to by the opposing party, if he think it insufficient. The general rule, however, requires the sheriff to take bond from the plaintiff before serving the writ, and the writ cannot be executed by delivery of the property unless the bond provided by statute be given.² And if he omits to require such bond as the statute provides, he is liable to the defendant for failure to take bond.

§ 291. **Return by sheriff of goods wrongfully seized by him.** When the sheriff wrongfully took property from a person other than the defendant named in the attachment, and afterwards, to a suit for such wrongful taking, he answered that he had returned the property to the parties from whom he took it; *held*, immaterial. The answer did not allege a return to the plaintiff, or any one by him authorized to receive it. The party who had it may himself have been a wrongdoer; or, suppose the property was seized while in the hands of a drayman, being moved from one point to another; a return to the drayman would not constitute a defense to the claim of the owner.³ The plaintiff sues for a taking or detention of the goods from him, and it is no answer to his claim to say they have been voluntarily delivered to another.

§ 292. **Duty of the sheriff on receiving a writ of replevin.** It is the duty of the sheriff, on receiving a writ of replevin, to execute it in the manner required by the statute, which should be his guide. He must serve it on the defendant in person, if he can be found; but a seizure and delivery of the property must be made where that can be done, whether personal service is had on the defendant or not.⁴ He must make

¹ *People, etc. v. Core*, 85 Ill. 248.

² *Smith v. McFall*, 18 Wend. 521; *Wilson v. Williams*, 18 Wend. 581; *Milliken v. Selye*, 6 Hill, 623.

³ *Caldwell v. Arnold*, 8 Minn. 265.

⁴ *Abrams v. Jones et al.*, 4 Wis. 806.

all reasonable efforts to find the goods. If he cannot do so without, he must search and inquire. If, influenced by vague rumors, he returns the writ without obtaining the goods, when they could have been found by search and inquiry, he will be liable.¹ The writ will sometimes be of no avail to the parties unless served promptly; and while the sheriff is not bound to lay aside all other business to attend to it, he is bound to use all reasonable endeavors to execute the process, so that it may take effect as the party designed.² In New York, when the sheriff has seized property under a writ of replevin, he is not bound to deliver it to the plaintiff before the securities on the bond have been accepted, or justified, and during the time the goods remain in his possession, he is not an insurer of them, but is bound to use such care of the goods as a careful man would exercise with his own property; whether he has done so or not, is a question for the jury.³ It has been held that if the sheriff leaves goods in the hands of the debtor, taking security for their delivery, or payment of the debt, he becomes liable if they are destroyed by fire or otherwise, except by act of God or the public enemy.⁴

§ 293. **Duty of the sheriff with respect to severing articles claimed to be real estate.** One of the most difficult questions touching the power and duty of the sheriff, is, when he is called upon to serve the writ of replevin by taking and delivering property apparently real estate, and which requires to be severed from the realty, to enable the officer to obey the command of the process. The writ is effectual for the delivery of personal property only, and furnishes no justification to an officer who, in attempting to serve it, severs and delivers part of the realty.⁵ So when suit was for rails, when defendant

¹ *Bosley v. Farquar*, 2 Blackf. 66.

² *Hinman v. Borden*, 10 Wend. 367; *Whitney v. Butterfield*, 13 Cal. 339; *Lindsay Exrs. v. Armfield*, 3 Hawks. (N. C.) 548; *Kennedy v. Brent*, 6 Cranch, 187; *Payne v. Drews*, 4 East, 523; *VanWinkle v. Udall*, 1 Hill. 559.

³ *Moore v. Westervelt*, 21 N. Y. 103; *Moore v. Westervelt*, 1 Bos. (N. Y.) 358. See *Rives v. Wilborne*, 6 Ala. 45.

⁴ *Browning v. Hanford*, 5 Denio, 586.

⁵ *Roberts v. The Dauphin Bank*, 19 Pa. St. 75; *Ricketts v. Dorrel*, 55 Ind. 470.

had built part of them into a fence before the writ was served, it was said those built into the fence were real estate, and could not be taken.¹ This rule undoubtedly governs in all cases. The sheriff is liable as a trespasser if he severs any part of the realty and delivers it, even though it is the identical property described in the writ. But the sheriff is also liable, if he refuse to serve the writ by delivering personal property therein described under pretense that it is real estate, unless such is really the case, and he must assume the responsibility, and act or refuse to act, as he shall judge proper. But in cases where there can be, and probably is, an honest difference of opinion, and the property is described as personal property in the affidavit and the writ, the sheriff ought to take proper indemnity from the parties and execute the writ, giving the defendant due opportunity to restrain if he wishes to do so.²

§ 294. **The liability of the officer a personal one.** The officer should bear in mind that any act done under color of his office affecting the rights of parties not named in the writ, may render him liable as a trespasser.³ So any failure or neglect on his part to serve the writ in a proper and legal manner, within the proper time, may subject him to an action at the hands of the injured party,⁴ and an illegal service may render him liable to the defendant. His liability is a personal one, and his official position does not change it. Where he is guilty of an act of trespass, judgment against him must be satisfied out of his individual property, and his resignation, removal, or the expiration of his term, will not change his liability.⁵ Therefore, when a reasonable doubt exists, he is not compelled to proceed without indemnity from the party in whose behalf he is acting.⁶ When the law requires the officer to act, as to acts done in the performance of his duty, it will

¹ *Bowen v. Tallman*, 5 S. & W. (Pa.) 560.

² *Elliott v. Black*, 45 Mo. 374; *Hamilton v. Stewart*, 59 Ill. 331.

³ *State v. Jennings*, 14 Ohio St. 78; *Moulton v. Jose*, 25 Me. 76; *Caldwell v. Arnold*, 8 Minn. 265.

⁴ *Brown v. Jarvis*, 1 Mees. & W. 704.

⁵ *Stillman v. Squires*, 1 Denio, 328.

⁶ *State v. Jennings*, 14 Ohio St. 78; *Colt v. Eves*, 12 Conn. 243.

favor a presumption that he has performed it, and the burden of showing to the contrary is on the other party.¹ The act of the deputy in seizing property is the act of the sheriff, and the possession of the deputy is the possession of the sheriff.² So the possession of a bailiff or custodian is the possession of the sheriff, and while the custodian may have a sufficient possession to be made a defendant in replevin, it by no means follows that the officer is not also liable.³ When a party obtains a valid writ of replevin against a sheriff, the officer should obey the writ by surrendering the goods in obedience to the process, but his refusal to do so does not make him a trespasser in the taking.⁴

§ 295. **The sheriff liable for the acts of his deputies.** The sheriff is liable for all the acts of his deputies in their official capacity. In the view of the law, all the deputies are but the servants of the sheriff.⁵

§ 296. **Disputes between deputies of the same sheriff settled by the sheriff.** Disputes between deputies of the same sheriff as to the possession of property which both have levied on, should be settled by the sheriff; neither deputy has any technical property in the thing. The sheriff has to answer one or both the attaching creditors, and must settle the dispute.⁶

¹ *Shorey v. Hussey*, 32 Me. 580.

² *Stillman v. Squires*, 1 Denio, 328.

³ *Ralston v. Black*, 15 Iowa, 48.

⁴ *Walker v. Hampton*, 8 Ala. 412; *Cole v. Conolly*, 16 Ala. 271; *Six Carpenter's Case*, 8 Co. Rep.

⁵ *Grinnell v. Phillips*, 1 Mass. 530; *Miller v. Baker*, 1 Met. 27; *Tuttle v. Cook*, 15 Wend. 274; *The People v. Schuyler*, 4 Comst. 173; *Poinsett v. Taylor*, 6 Cal. 78; *King v. Chase*, 15 N. H. 9; *King v. Orser*, 4 Duer. 431; *People v. Brown*, 6 Cow. 41; *Terwillinger v. Wheeler*, 35 Barb. 620. But not for the act of his deputy in levying a distress warrant illegally; in such case he acts as bailiff of landlord. *Moulton v. Norton*, 5 Barb. 286. See *Vanderbilt v. Richmond Co.*, 2 Comst. 479; *Cotton v. Marsh*, 3 Wis. 240. In Vermont, the deputy seems to have an action in his own name for any interference with property seized by him. *Stanton v. Hodges*, 6 Vt. 64.

⁶ *Perley v. Foster*, 9 Mass. 112; *Ackworth v. Kemp*, Douglas, 40; *Woodgate v. Knatchbull*, 2 D. & East. 150. *Contra*, see *Gordon v. Jenney*, 16 Mass. 469, where it is held that deputies act independently of each other, and that one of them can maintain replevin against another, of the same sheriff.

§ 297. **The officer's return.** The return of the officer should be made without delay.¹ It must distinctly and clearly set out his acts, under the authority of the writ. If a part of the property only has been taken, the return must show what part, so that from the return alone, the court can see what has been done. Otherwise, upon an order for a *return* of the property replevied, or on a question arising as to what was actually delivered, a dispute might arise and the court have no certain means of determining.² As to matters material to be returned, it is so far conclusive that it cannot be contradicted or avoided in the suit, for the purpose of defeating any rights which have been acquired by the parties under it;³ but the return of collateral facts may be traversed.⁴

§ 298. **As to the service of a writ of replevin.** Where, as is the case in replevin, the writ points out the precise thing to be done or the specific property to be siezed, the officer has no discretion. He must take the goods if found in the defendant's possession, and where he does so, the court will protect him in obeying its mandate.⁵ This rule is illustrated in Wisconsin, in a case where an attachment for a laborer's lien was sued out. The writ commanded the officer to attach the identical property and replevin was not permitted, the lien being against that particular property,⁶ and the writ was regarded as a protection to the officer in retaining possession of the property.⁷ When an action of trespass was brought against an officer for taking away a horse, under a writ of replevin which commanded him to cause the beast of the

¹ *Hutchinson v. McClellan*, 2 Wis. 17.

² *Mattingly v. Crowley*, 42 Ill. 300; *Pool v. Loomis*, 5 Ark. 110; *Miller v. Moses*, 56 Me. 134; *Nashville Ins. Co. v. Alexander*, 10 Humph. (Tenn.) 378;

³ *Knowles v. Lord*, 4 Whart. (Pa.) 500; *Cornell v. Cook*, 7 Cow. (N. Y.) 310; *Messer v. Baily*, 11 Fost. (N. H.) 9; *Pardee v. Robertson*, 6 Hill, (N. Y.) 550.

⁴ *Brown v. Davis*, 9 N. H. 76; *Messer v. Baily*, 11 Fost. (N. H.) 9; *Augier v. Ash*, 6 Fost. (N. H.) 99; *Lewis v. Blair*, 1 N. H. 69; *Evans v. Parker*, 20 Wend. 622; *Browning v. Hanford*, 5 Denio, 586. In a suit against an officer for taking property by replevin, the return of the officer cannot be read against him without reading the writ. *Weinberg v. Conover*, 4 Wis. 803.

⁵ *Buck v. Colbath*, 3 Wall. (Sup. Ct.) 334.

⁶ *Union Lumber Co. v. Trouson*, 36 Wis. 129.

⁷ *Griffith v. Smith*, 22 Wis. 647; *Battis v. Hamlin*, 22 Wis. 669.

plaintiff, "impounded or distrained," to be replevied, etc. The horse replevied was not distrained or impounded and the officer knew it, and it was contended that the officer ought not to have served the writ, and that in so doing he became a trespasser; the court, however, held that the defendant was a legal officer and that it was his duty, regardless of any supposed knowledge of his own that there existed no cause of action, to serve the writ committed to him; that the writ, valid on its face, was a protection, and it was no part of his duty to determine that the replevin was improperly issued; his duty was to obey the writ.¹ As has been shown, the statute in many of the States gives the defendant the right to interpose a claim of property, to give bond and retain the property in his possession until the rights of the contestants are determined. When the defendant claims the property, the sheriff ought, in the absence of any statute fixing time, to allow him a reasonable time within which to give bond to retain the possession, and in an action of trespass against the sheriff, the writ will be no protection unless such time is allowed.²

§ 299. **Effect of the replevin of property seized on execution.** The levy of an execution will operate as a satisfaction of it, *sub modo*. Even though the property should be replevied the bond is regarded as an indemnity, and the sheriff cannot make any other or further levy upon that execution. If the result of the suit, however, is against the officer, the levy is not payment of the debt.³

§ 300. **Special property created by a levy on goods.** An officer who has seized property on a writ of execution or attachment has such a special property therein as will sustain replevin or trover.⁴ This is founded on the officer's responsibility for the safe keeping of the goods in his custody as well as his duty and responsibility under his process.⁵ And a sale

¹ *Watson v. Watson*, 9 Conn. 140.

² *Hocker v. Stricker*, 1 Dall. 225, 245.

³ *Hunn v. Hough*, 5 Heisk. 713.

⁴ *Lockwood v. Bull*, 1 Cow. 322; *Polite v. Jefferson*, 5 Har. (Del.) 388; *Norton v. People*, 8 Cow. 137; *Dezell v. Odell*, 3 Hill, 215.

⁵ *Lathrop v. Blake*, 3 Foster, (N. H.) 56.

on such process conveys all the title which the defendant in the process had.¹ When the officer has delivered the goods to a receptor for safe keeping the officer is regarded as still in possession, and he may maintain trover for them.² When a marshal of an incorporated town seized goods by virtue of a legal process, and they were unlawfully taken from him, he was allowed to sustain replevin against the wrong-doer.³

§ 301. **Justification by an officer.** When an officer justifies his taking under a writ of attachment or an execution, the plea should state the nature of the writ, and the court or authority under which the same was issued. It should also state what the commands of the writ were, so that the court may see what he has done, and whether he has obeyed the writ or not. The plea should also show, if such be the fact, that the plaintiff in replevin was the defendant in the process, and in all cases that the goods belonged to the defendant in the process and were taken from him, or on the process against him, and are in the custody of the law.⁴ But in some States the plea, or answer of general denial, is held broad enough to permit an officer who is defendant to show that he has taken the property upon process, and that the goods belong to the plaintiff, or to the plaintiff and another jointly, and were seized upon process against him.⁵

§ 302. **The defense by sheriff when goods seized are replevied from him.** The sheriff, in levying an execution or

¹ *O'Connor v. Union Line*, 31 Ill. 230; *Hazzard v. Benton*, 4 Har. (Del.) 62.

² *Norton v. The People*, 8 Cow. 137; *Dezell v. Odell*, 3 Hill, 215.

³ *Fitch v. Dunn*, 3 Blackf. 142.

⁴ *Whittington v. Dearing*, 3 J. J. Marsh, (Ky.) 684; *McCarty v. Gage*, 3 Wis. 404; *Richardson v. Smith*, 29 Cal. 5 29; *Parsley v. Huston*, 3 Blackf. 348; *Dillon v. Wright*, 4 J. J. Marsh, (Ky.) 254. See, also, *Stephens v. Frazier*, 2 B. Mon. (Ky.) 250; *Gentry v. Bargis*, 6 Blackf. 262; *Dillon v. Wright*, 4 J. J. Marsh, (Ky.) 254; *Bridges v. Layman*, 31 Ind. 384; *Truitt v. Revill*, 4 Har. (Del.) 71. The process need not be copied, but must be set up. *Parsley v. Huston*, 3 Blackf. 348; *Wheeler v. McCorristen*, 24 Ill. 42; *Van Namee v. Bradley*, 69 Ill. 301; *Mt. Carbon Coal Co., etc., v. Andrews*, 53 Ill. 185. For a form of plea in such case, see *Lammers v. Meyer*, 59 Ill. 216.

⁵ *Branch v. Wiseman*, 51 Ind. 1. When the sheriff pleaded that the property belonged to A. and B. and that he had seized it under an attachment as sheriff; *held*, that it might be regarded as a plea of property in a third person. *Levi v. Darling*, 28 Ind. 498; *Martin v. Watson*, 8 Wis. 315.

attachment, assumes the responsibility that the goods levied on belong to the defendant named in the process, and if the goods are replevied from him his plea must aver that the goods were the property of the defendant in the process under which they were seized.¹ When the officer wishes to contest the title of the plaintiff as fraudulent as to creditors' whose process he holds, the fraud should be specially pleaded; otherwise he may not be permitted to show it.² So when the claim of the plaintiff is wholly, or in part, void for usury — when the statutes allow the defense to be made by parties or privies — the usury may be pleaded.³ Where property seized on execution is replevied from the officer, and he wishes an order for return, he must not only plead the execution and a judgment but a valid execution and judgment must also be given in evidence to support the plea.⁴ And the plea and the evidence should show that the writ was in full force and not satisfied, and that the property was taken in obedience to the writ.⁵

§ 303. **The same.** When the vendee of goods replevied them from a sheriff who seized them on mesne process against the vendor before the sheriff could contest the sale on the ground that it was fraudulent, he was compelled to make out a *prima facie* case, at least, of indebtedness. His right depended on the existence of a debt due to the plaintiff in the process.⁶ The officer, in such case, is representing the creditors, and they have no right to contest the sale unless they show a debt, or some obligation which the vendee is under to them. A sale by a sheriff can transfer no better title than the defendant had in the process upon which the sale was made.⁷

¹ *Smith v. Winston*, 10 Mo. 301; *Gentry v. Bargis*, 6 Blackf. 262; *Adams v. Hubbard*, 30 Mich. 104; *Buck v. Colbath*, 3 Wall. 342, 334.

² *Frisbee v. Langworthy*, 11 Wis. 375.

³ *Dix v. Van Wyck*, 2 Hill. 522.

⁴ *Glascocock v. Nave*, 15 Harrison, (Ind.) 458; *Beach v. Botsford*, 1 Doug. (Mich.) 206; *Clay v. Caperton*, 1 T. B. Mon. (Ky.) 10; *Sandeford v. Hess*, 1 Head, (Tenn.) 679.

⁵ *Dayton v. Fry*, 29 Ill. 526.

⁶ *Sanford Manf. Co. v. Wiggin*, 14 N. H. 441; *Damon v. Bryant*, 2 Pick. 413.

⁷ *Goodrich v. Fritz*, 4 Ark. 525; *Shearick v. Huber*, 6 Binns. (Pa.) 4; *McDonald v. Prescott*, 2 Nev. 109; *O'Conner v. Union Line, etc.*, 31 Ill. 230; *Hazzard v. Benton*, 4 Har. (Del.) 62.

CHAPTER XII.

TAKING BY THEFT, FORCE OR FRAUD.

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§ 304. **Taking by theft, trespass or fraud.** With the growth of the common law, individual title to property became gradually strengthened, until the rule became crystallized in substantially the form in which it exists in the Constitution of these States. "No man shall be deprived of his property, unless by his own consent or due process of law." In this respect, the protection given to property was next to that extended to life and liberty.

§ 305. **Thief acquires no title to the stolen goods.** A thief acquires no title to the goods he steals and can convey none, by any sale and delivery he may make. The owner of such stolen goods may recover them from whosoever hands he finds them in.¹

§ 306. **Sale in market overt.** An exception was made by the common law, in cases where goods which had been stolen, were sold in market overt. Such a sale passed absolute title to the purchaser. But the ancient law prohibited the sale of anything above the value of twenty pence, except in market overt. Sales in such markets were exceedingly formal and open, and were required to be preceded by proof of ownership on the part of the vendor, so that there was little danger of

¹ 2 Bla. Com. 449; *Beazley v. Mitchell*, 9 Ala. 780; *Saltus v. Everett*, 20 Wend. 275; *Sharp v. Parks*, 48 Ill. 513; *Parham v. Riley*, 4 Cold. (Tenn.) 9; *Hoffman v. Carow*, 20 Wend. 20; S. C., 22 Wend. 285; *Courtis v. Cane*, 32 Vt. 232; *Lance v. Cowan*, 1 Dana, (Ky.) 195; *Arendale v. Morgan*, 5 Sneed, (Tenn.) 703; *Johnson v. Peck*, 1 Wood & M. C. C. 334; *White v. Spettigue*, 1 Carr. & Ker. 673; *Florence Sew. Mach. v. Warford*, 1 Sweeny, (N. Y.) 433.

stolen goods being offered without immediate detection of the thief.¹

§ 307. **Markets overt unknown in this country.** But markets overt are unknown to the law of this country.² Sales of chattels are made on all occasions without question, the purchaser and seller relying on the confidence each has in the other. This confidence, usually well placed, is sometimes betrayed by persons who obtain goods regardless of the owner's rights, for the sole purpose of making way with them. This is sometimes done by theft, sometimes by trespass, but oftener by means of a fraudulent purchase, followed by sale to some innocent third party. Where the goods have been so purchased, the question is, who shall bear the loss, the innocent and defrauded owner, or the equally innocent purchaser. Where the goods are overtaken in the hands of the wrongdoer, his fraud, as we shall see, is no protection, but where they are found in the hands of a *bona fide* purchaser, for value, the question presents more difficulty.

§ 308. **Replevin of stolen goods does not depend on the conviction of the thief.** As before stated, goods acquired by theft or robbery do not vest in the taker. The owner may retake them in this action, whether he finds them in the hands of the taker, or of an innocent purchaser for value; and the conviction of the thief, which was under the ancient law a prerequisite, is not now a necessary condition to a successful prosecution of the suit.³

¹ 2 Bla. Com. 449; *Hoffman v. Carow*, 22 Wend. 285.

² *Griffith v. Fowler*, 18 Vt. 390; *Dame v. Baldwin*, 8 Mass. 518; *Parham v. Riley*, 4 Cold. (Tenn.) 9; *Ventress v. Smith*, 10 Peters, 161; *Newkirk v. Dalton*, 17 Ill. 415; *Lowry v. Hall*, 2 W. & S. (Pa.) 134.

³ With reference to the necessity of a conviction of the thief before the owner can reclaim his stolen property, see *Foster v. Tucker*, 3 Gr. (Me.) 458; *Newkirk v. Dalton*, 17 Ill. 415; *Boston & W. R. R. v. Dana*, 1 Gray, 83; *Pettingill v. Rideout*, 6 N. H. 454; *Short v. Barker*, 22 Ind. 148; *Gordon v. Hostetter*, 37 N. Y. 99; *Boody v. Keating*, 4 Gr. (Me.) 164; *Wells v. Abraham*, L. R. 7 Q. B. 554; *Hoffman v. Carow*, 22 Wend. 285. The law which prohibited a private action against the thief was for the purpose of compelling the owner to prosecute him to conviction; the right to recover was suspended. *Crosby v. Leng*, 12 East. 409. But the prohibition only extended to suit against the thief, therefore, if he had pawned it or sold it,

§ 309. A trespasser acquires no title, and can convey none, by any sale. One who wrongfully takes goods without the owner's consent, acquires no title thereby, and can convey none, by any sale or transfer he may make. So when such a taker sells the goods, even to an innocent purchaser for value, the owner may pursue his property and retake it wherever found. Where a willful trespasser cut logs on another's land, and sold them to one who sold them to an innocent purchaser for value, the owner was permitted to recover their value with interest, from such purchaser; or, he might have recovered the logs had he been able to identify them.¹ Where the defendant, by his encouragement, procured a messenger to leave a machine with him, knowing that it was intended for another, and afterward made some repairs on it, the taking was regarded as wrongful, and the owner might sustain replevin without demand.²

§ 310. Replevin lies for goods obtained by fraud, even from one who innocently purchases. Where a party procured possession of leather by personating another, who was an agent of the owner, and shipped it to Chicago, and sold it in open market, the real owner was entitled to sustain trover against the purchaser for value. The possession was not delivered to the vendor, but was obtained under circumstances which might convict him of embezzlement. Under such circumstances no title passed, and the taker could confer none by sale. Possession is one of the *indicia* of ownership; but bare possession is not title, and when that possession is obtained by force or fraud, it confers no right.³

the owner might bring his action against the purchaser or the pawnbroker without waiting for conviction of the thief. *White v. Spettigue*, 13 M. & W. 608. This cannot be reconciled with *Horwood v. Smith*, 2 T. R. 750; *Gimson v. Woodfull*, 2 Carr. & P. 41. See Stat. 24 and 25, Victoria, Chap. 96, § 100; 7 and 8 Geo. IV., Chap. 20, § 57.

¹ *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491. See *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Riford v. Montgomery*, 7 Vt. 418; *Courtis v. Cane*, 32 Vt. 232; *Schulenberg v. Harriman*, 21 Wall. 44; *Williams v. Merle*, 11 Wend. 80; *Gibbs v. Jones*, 46 Ill. 320.

² *Purvis v. Moltz*, 5 Robt. (N. Y.) 653.

³ *Fawcett v. Osborn*, 32 Ill. 411.

§ 311. **Innocent purchaser from a thief may elect to affirm the contract as against the thief.** While the sale or exchange of stolen goods does not divest the owner of his title, yet, as between the thief and his vendee, the innocent party is the only one able to avoid the sale. Thus, if one buy or exchange for a stolen horse, the owner can recover the horse, and the purchaser may elect to rescind the contract and recover the consideration, or he may affirm the contract and recover the value of the horse from the thief who sold him.¹ When W. traded to B. a horse which he had stolen, and then sold to C. the horse he received from B., B. brought replevin against C., and it was held he could not recover. This was not a case where the owner of the stolen horse brought suit, but the plaintiff was seeking to recover property which he had voluntarily sold and delivered, and something that had come into the possession of a *bona fide* purchaser for value.² Some of the cases assert the doctrine that one who receives and sells stolen goods, as agent, and without any knowledge pays the money to the thief, is liable to the owner for the value.³ For example, a stable keeper who receives a stolen horse, without any knowledge of the theft, would be liable in replevin, at the suit of the owner, as long as he held possession; and if he sells the horse, he has been held liable for the proceeds, and the fact that he has paid them over to the thief has been said to be no defense.⁴

§ 312. **Replevin by the owner of goods sold by a bailee without authority.** If a bailee, without authority, sell goods entrusted to his care, even though the purchaser pay full value, and have no knowledge of the fraud, still the owner does not lose his title.⁵ The general rule is, that an agent cannot bind

¹ Titcomb v. Wood, 38 Me. 561; Lee v. Portwood, 41 Miss. 111; Smith v. Graves, 25 Ark. 458.

² Brown v. Campsall, 6 Har. & J. (Md.) 491. Consult Doe v. Martyr, 4 Bos. & Pull. 332.

³ Hoffman v. Carow, 20 Wend. 20; Same v. Same, 22 Wend. 285.

⁴ Sprights v. Hawley, 39 N. Y. 441; Stanley v. Gaylord, 1 Cush. 536; Dudley v. Hawley, 40 Barb. 397. Compare Rogers v. Huie, 2 Cal. 571; where the contrary is held.

⁵ 2 Kent, 324; Hilliard on Sales, 23; 1 Parsons on Contracts, 44; Dyer v. Pearson, (3 B. & C.) 10 E. C. L. 38; Williams v. Merle, 11 Wend. 80; Inger-

his principal, where he transcends his authority, and persons who deal with an agent in the concerns of his principal ought to know the extent of his authority.¹ It is also a rule, that mere possession of chattels will not authorize a transfer of a better title than the possessor has.² So, where a mortgagee of chattels in Illinois took them to Indiana and sold them, the court said, that upon a proper showing, the mortgagee could recover them.³ A servant who sells his master's goods without authority can convey no title.⁴ So, when a servant quits the employ of his master, and takes away his master's goods, it is a conversion, and replevin, without demand, will lie.⁵ Where one hires a horse, for the purpose of making a particular journey, and goes further, he is liable, and the owner might sustain replevin or trover; but if, on his return, he informs the owner of his increased journey, and he accepts payment under those circumstances, it is a waiver of the conversion.⁶

§ 313. **The same. Rights and authority of a bailee.** The law simply requires a party, in dealing with an agent or bailee, to look at the acts of the principal. Private communications to the agent would not generally affect the rights of *bona fide* third parties dealing with him about the business of the principal within the scope of his agency. If one send his horse to a place where horses are shod, it confers no authority on the smith to sell; but if he send his horse to an auction stable,

soll v. Emmerson, 1 Carter, (Ind.) 78; Stanley v. Gaylord, 1 Cush. 536; Kitchell v. Vanadar, 1 Blackf. (Ind.) 356; Pribble v. Kent, 10 Ind. 325; Johnson v. Willey, 46 N. H. 76; Sanborn v. Colman, 6 N. H. 14; Poole v. Adkisson, 1 Dana, 110; Roland v. Gundy, 5 Ohio, 202; Lovejoy v. Jones, 30 N. H. 169; Sargent v. Gile, 8 N. H. 325; Galvin v. Bacon, 2 Fairfield, (Me.) 28; Nash v. Mosher, 19 Wend. 431; Howland v. Woodruff, 60 N. Y. 74; Neff v. Thompson, 8 Barb. 213; Sarjeant v. Blunt, 16 Johns. 74; Wilson v. Nason, 4 Bosw. 155; Lecky v. M'Dermott, 8 S. & R. (Pa.) 500. Compare Drummond v. Hopper, 4 Har. (Del.) 327.

¹ Cases last cited. Schemmelpennich v. Bayard, 1 Pet. 264.

² Hotchkiss v. Hunt, 49 Me. 213; Covill v. Hill, 4 Denio, 327.

³ Blystone v. Burgett, 10 Ind. 28; Martin v. Hill, 12 Barb. 631. See Barker v. Stacy, 25 Miss. 477; Offutt v. Flag, 10 N. H. 46; Jones v. Taylor, 30 Vt. 42.

⁴ Trudo v. Anderson, 10 Mich. 357.

⁵ Pillsbury v. Webb, 33 Barb. 214.

⁶ Rotch v. Hawes, 12 Pick. 136.

it will not be presumed that he was sent there for safe keeping, but for the purpose of sale generally carried on there.¹ If, therefore, in the latter case, the agent sell the horse, even on different terms than his private instructions warrant, the sale would be good;² but if the ordinary business of the agent was for purposes other than sale of horses, the sale would confer no title except such as the agent was specially entrusted with. Purchasers must ascertain his authority at their peril. A purchase from an agent without authority, even though the purchaser pay full value, and acts in good faith, carries no title, and the owner may sustain replevin.³

§ 314. **The same. Illustrations of the rule.** If a man send his goods to an agent to be sold on his account, and the latter sell them to his creditor for the payment of his own debt, the title of the owner is not thereby divested, and replevin will lie even against a subsequent purchaser, without notice.⁴ But where one obtain goods fraudulently, and bail them to another, the bailee may surrender to the true owner, and may show such facts as a bar to any suit against himself by the bailor.⁵ When A. contracted for a boiler and engine of certain power, and paid seven hundred dollars on it, the maker to take it back and refund the money if it did not prove sufficient; it proved insufficient, and the maker refused to receive it; but some months afterwards asked A. to let him take it, promising to pay for the use of it. Soon after obtaining it, he mortgaged it to one who had no notice. A. brought replevin, and recovered. Even if the bailee had a right, as he claimed,

¹ *Pickering v. Busk*, 15 East, 39; *Hicks v. Hankin*, 4 Esp. 114; *Stanley v. Gaylord*, 1 Cush. 544.

² *Surjeant v. Blunt*, 16 Johns. 74; *Moore v. McKibbin*, 33 Barb. 246; *McMorris v. Simpson*, 21 Wend. 610.

³ *East India Co. v. Hensley*, 1 Esp. 112; *Johnson v. Willey*, 46 N. H. 75; *Fenn v. Harrison*, 3 D. & E. 754; *Saunborn v. Colman*, 6 N. H. 14; *Lovejoy v. Jones*, 10 Foster, 165; *Sargent v. Gill*, 8 N. H. 325; *Jefferson v. Chase*, 1 Houst. (Del.) 219. Compare *Stanley v. Gaylord*, 1 Cush. 544.

⁴ *Galvin v. Bacon*, 11 Me. 28; *Parsons v. Webb*, 8 Gr. (Me.) 38; *Herron v. Hughes*, 25 Cal. 556; *Loeschman v. Machin*, 2 Stark. 311; *Hyde v. Noble*, 13 N. H. 494.

⁵ *Bates v. Stanton*, 1 Duer. (N. Y.) 79.

to sell it, he had no right to mortgage.¹ This rule is based upon the assumption that the title of the original owner remains unimpaired by any fraudulent act of the bailee; that the bailee, having no title, cannot convey any by sale or transfer, and that a purchaser from such bailee takes no title, but simply a possession, without other right.²

§ 315. **Replevin lies against a carrier for goods wrongfully taken and committed to his care.** Such carrier has no lien on the goods for freight. A common carrier, who receives goods from a wrongful taker, without knowledge of the wrong, cannot resist the action by the true owner.³ Neither can he assert a lien for his services as such carrier.⁴ Where an innkeeper was sued in replevin for a horse, and the defendant claimed a lien for his keeping, and plaintiff contended that the horse had been stolen, Lord Holt said the innkeeper is not bound to consider who is the owner of the horse, but whether he who brings him is his guest.⁵ This latter ruling, however, was disregarded in the cases before cited. There may be a distinction between an innkeeper who feeds a horse, which is necessary to save the animal, and is for the owner's benefit, and a carrier who transports goods, which may be to the injury of the owner. But the cases are tolerably clear that a carrier cannot set up a lien against the true owner for his carriage of such goods, since he may demand his charges in advance, if he be so minded. The action, however, would not lie without demand.⁶

§ 316. **Replevin lies where a bailee pledges goods without authority.** When the owner of pork in a warehouse entrusted the warehouse receipts to a party to repack it, and

¹ *Stevens v. Cunningham*, 3 Allen, (Mass.) 492. See, also, *Nash v. Mosher*, 19 Wend. 431; *Trudo v. Anderson*, 10 Mich. 357; *Ballou v. O'Brien*, 20 Mich. 304; *Legal News*, April 7, 1877, 237.

² *Ingersoll v. Emmerson*, 1 Carter, (Ind.) 79.

³ *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Robinson v. Baker*, 5 Cush. 137; *Van Buskirk v. Purinton*, 2 Hall, (N. Y.) 561; *Collman v. Collins*, 2 Hall, (N. Y.) 569.

⁴ *Kinsey v. Leggett*, 71 N. Y. 387.

⁵ *Yorke v. Grenaugh*, 2 Ld. Raym. 866.

⁶ *Fitch v. Newberry*, 1 Doug. (Mich.) 1.

the latter pledged the receipts as collateral for a loan of money, and in default of payment the lender sold the pork, the real owner was permitted to sustain replevin, although an innocent party purchased for value.¹

§ 317. **The rule when an agent or bailee with authority sells at a less price than his instructions warrant.** When an agent or bailee, with authority to sell, does sell at a less price than his instructions warrant, he is not guilty of conversion; nor would a purchase from him, unless fraudulent, render the purchaser liable to the owner either for the value or for the goods.² In such case the sale is in pursuance of the authority delegated, and the law does not hold a purchaser responsible that the agent observes the details of his instructions. It is enough that the purchaser assure himself that the agent has authority to sell and receive payment, and in such case, if the agent abscond with the proceeds, the principal by whose authority he acted must assume the loss.

§ 318. **Fraudulent purchaser takes a title voidable at the election of the defrauded vendor.** A sale and delivery of goods, procured through the fraudulent representations of the buyer, with intent to cheat the seller, may be avoided by the latter. In such case, as between the vendor and purchaser, a voidable title to the property passes.³ The fraud practiced is regarded as sufficient to avoid the contract, if the innocent party so elect. The fraudulent purchaser, however, cannot avoid it on the ground of his own fraud. The real owner may prefer to treat him as a purchaser and recover value, or he may elect to rescind the sale and recover his goods in

¹ *Burton v. Curyea*, 40 Ill. 324. As before stated replevin lies for personal chattels only. Where one hires chattel property and fixes it to real estate, and sells it so fixed to one who has no notice, the owner cannot recover from the innocent purchaser, because it has become part of the realty. *Fryatt v. The Sullivan Co.*, 5 Hill, (N. Y.) 117.

² *Dufresne v. Hutchinson*, 3 Taunt. 117; *Sarjeant v. Blunt*, 16 John. 74; *Laverty v. Snethan*, Cent. Law J. April, 1877, 330; *Scott v. Rogers*, 31 N. Y. 676.

³ *Ayres v. Hewitt*, 19 Me. 281; *Hunter v. Hudson River Iron Co.*, 20 Barb. 494; *Nichols v. Michael*, 23 N. Y. 266; *Nichols v. Pinner*, 18 N. Y. 295; *Sargent v. Sturm*, 23 Cal. 359.

replevin.¹ The rule may be regarded as settled that where goods are obtained from the owner by fraudulent purchase, he can sustain replevin against the fraudulent purchaser so long as the goods are in his possession.²

§ 319. **Observations on the rule.** An exceedingly plausible distinction was taken in a New York case, where it was said that the goods having been sold and delivered to the defendant, the plaintiff had voluntarily parted with his actual as well as his constructive possession, that as the taker had acquired possession by delivery from the owner, trespass would not lie, and that as replevin was strictly concurrent with trespass, replevin would not lie;³ but the correctness of this ruling has been doubted,⁴ the error lying in the assumption that trespass and replevin are strictly concurrent. And upon the same point being presented again, the court held squarely that trespass, trover, or replevin in the *cepit* or *detinet* would be proper in such case.⁵ In this case the court says that

¹ Rowley v. Bigelow, 12 Pick. 307; Lloyd v. Brewster, 4 Paige, 541; Gray v. St. Johns, 35 Ill. 239; Titcomb v. Wood, 38 Me. 563; Hall v. Naylor, 18 N. Y. 588; Cary v. Hotailing, 1 Hill, 311; Ash v. Putnam, 1 Hill, 302; Olmstead v. Hotailing, 1 Hill, 317; Matteawan Co. v. Bentley, 13 Barb. 641; Hall v. Gilmore, 40 Me. 581; Seaver v. Dingley, 4 Gr. (Me.) 307; Gray v. St. John, 35 Ill. 239. Consult Bristol v. Wilsmore, 1 B. & C. 514; Kilby v. Wilson, 1 R. & Moody, 178; Van Cleef v. Fleet, 15 Johns. 149; Hill v. Freeman, 3 Cush. 259; Hussey v. Thornton, 4 Mass. 405; Marston v. Baldwin, 17 Mass. 606; Smith v. Dennis, 6 Pick. 262; Bowen v. Schuler, 41 Ill. 193; Mackinley v. McGregor, 3 Whart. (Pa.) 368.

² Acker v. Campbell, 23 Wend. 372; Abbotts v. Barry, (2 Brod. & Bing.) 6 E. C. L. 370; Browning v. Bancroft, 8 Met. 278; Coghill v. Boring, 15 Cal. 217; Weed v. Page, 7 Wis. 503; Welker v. Wolverkuehler, 49 Mo. 36; Andrew v. Dieterich, 14 Wend. 32; Malcom v. Loveridge, 13 Barb. 372; Allison v. Matthieu, 3 Johns. 235; Keyser v. Harbeck, 3 Duer. 373; Williams v. Given, 6 Gratt. 268; Jennings v. Gage, 13 Ill. 610; Titcomb v. Wood, 38 Me. 561; Caldwell v. Bartlett, 3 Duer. 341; Stephenson v. Hart, 4 Bing. 476; Bristol v. Wilsmore, 1 B. & Cress. 514; Manning v. Albee, 14 Allen, 8; Noble v. Adams, 7 Taunt. 59.

³ M'Carty v. Vickery, 12 John. 348. Compare Nash v. Mosher, 19 Wend. 431; Marshall v. Davis, 1 Wend. 109. These cases only hold that trespass does not lie against one who lawfully acquires possession, even though the original taker was a wrong-doer.

⁴ Butler v. Collins, 12 Cal. 457; Ash v. Putnam, 1 Hill, 307; Barrett v. Warren, 3 Hill, 348.

⁵ Cary v. Hotailing, 1 Hill, 312.

M'Carty v. Vickery stands alone, all the other cases on this subject being the other way.¹

§ 320. **The same.** When consent of the vendor is urged as an element to be weighed, it must be remembered that consent of a person to the sale of his goods means something more than the simple utterance of the words of assent, and something more than a manual relinquishment of them. It must be an act of the mind, unclouded by fraud, falsehood or duress at the hands of the purchaser. Whether the degree of fraud is sufficient to warrant the finding of an indictment or not, is of no consequence in a civil action.² In such case the law holds that the goods did not lawfully come into the possession of the defendant.³

§ 321. **Illustrations of the rule.** When the defendant recommended L. as a man of means, and induced the plaintiff to sell him furniture, L. soon after absconded, after having transferred the furniture and other goods to the defendant. The plaintiff was permitted to prove that the defendant had recommended L. in like manner to others, and that the goods so obtained were transferred to the defendant, as a circumstance to show knowledge on his part.⁴ Defendant by forged letters of recommendation, and other false representations, bought goods, and paid in bills which he represented to be accepted by a wealthy business man, but which were in fact accepted by an accomplice for fraudulent purposes. The goods were delivered, and shortly after levied on by the sheriff with an execution. In trover against the sheriff, it was held no property passed and that the owner could recover.⁵ Where one represents himself or his firm to be solvent, when he

¹ See *Olmsted v. Hotailing*, 1 Hill, 317. In *Trapnall v. Hattier*, 1 Eng. (Ark.) 23, where a very similar course of argument with *M'Carty v. Vickery* was pursued, but the question presented in Arkansas involved an innocent purchaser.

² *Irving v. Motly*, 7 Bing. 543; *Poor v. Woodburn*, 25 Vt. 234; *Acker v. Campbell*, 23 Wend. 373.

³ *Seaver v. Dingley*, 4 Gr. (Me.) 307; *Thurston v. Blanchard*, 22 Pick. 20; *Hall v. Gilmore*, 40 Me. 581; *Gray v. St. John*, 35 Ill. 239.

⁴ *Allison v. Mathieu*, 3 Johns. 235.

⁵ *Tamplin v. Addy*, in note to *Mowry v. Welsh*, 8 Cow. 238.

knows it to be insolvent, and purchases with intent not to pay, such fraud will avoid the sale, and the owner may sustain replevin;¹ and the administrator of the defrauded vendor may sustain the action, as well as the deceased seller.²

§ 322. **Not material at what time the fraudulent representations were made.** It is not material whether the fraudulent representations were made at the exact time of the purchase or some time previous. It is sufficient if the goods were obtained through their influence;³ or the fraudulent intent may be gathered from the acts of the purchaser after the sale.⁴

§ 323. **Goods paid for with worthless note, counterfeit money, or stolen goods.** When the vendor was induced by the fraudulent representations of the buyer, to sell goods and take the notes of a worthless third party in payment, it would not deprive the defrauded vendor of his right to his goods, even when he had negotiated the note for value, and not reclaimed it, unless he had knowledge of the fraud at the time he parted with it.⁵ So where one purchase goods and pays for them with counterfeit money,⁶ or with other goods which he has stolen.⁷ In these and similar cases the defrauded vendor may recover his goods from the fraudulent purchaser, though not from a *bona fide* purchaser from such party for value.

§ 324. **Replevin against attaching creditors in such cases.** It seems to be the law that when one, through fraudulent representations as to his solvency, purchases and obtains goods on credit, and they are subsequently attached by his creditors, that the defrauded vendor can sustain replevin as against the

¹ *Ash v. Putnam*, 1 Hill, (N. Y.) 308; *Bristol v. Wilsmore*, 1 Barn. & Cress. 515; *Kilby v. Wilson*, Ry. & Moody, (N. P.) 178; *Atkin v. Barwick*, 1 Stra. 165; *Johnson v. Peck*, 1 Wood & Minot. C. C. 334; *Powell v. Bardlee*, 9 Gill. & J. (Md.) 220.

² *McKnight v. Morgan*, 2 Barb. 171.

³ *Seaver v. Dingley*, 4 Greenleaf, (Me.) 307.

⁴ *Bowen v. Schuler*, 41 Ill. 194; *Allison v. Matthieu*, 3 Johns. 235.

⁵ *Manning v. Albee*, 11 Allen, 520; S. C., 14 Allen, 8.

⁶ *Green v. Humphrey*, 50 Pa. St. 213.

⁷ *Titcomb v. Wood*, 38 Me. 563; *Lee v. Portwood*, 41 Miss. 111.

creditors. Of course, as against the debtor the right of the attaching creditors is paramount, but they can only sustain their claim on the ground that the goods belong to the fraudulent purchaser. The purchaser's only title to them, however, being fraudulent, and having been rescinded by the original and prior owner, the attaching creditors cannot resist the suit of the defrauded vendor.¹

§ 325. **Or against an assignee for the benefit of creditors.** So in case of a voluntary assignment for the benefit of creditors of goods fraudulently purchased, the assignment passed no title and conferred no rights, for the obvious reason that the party making it had no right or title (as against the plaintiff's,) which he could confer on anybody. Therefore, the defendant's act in taking possession was an interference with the plaintiff's constructive possession. The defendant's act in assuming dominion over the property was none the less an invasion of the plaintiff's rights because he did not intend a wrong, or know that he was committing one. The law gives the plaintiff compensation for the injury he sustains, whether the defendant intended it or not.²

§ 326. **Does not lie for goods sold to enable the purchaser to violate the law, even though there may have been fraud in the purchase.** Where a party sought to recover intoxicating liquors from the possession of the sheriff, who had seized them on process of attachment against the goods of the purchaser, on the ground that he purchased them from the plaintiff by fraudulent representations, the court refused to sustain the action, saying that the liquors were sold to enable the purchaser to evade the law, and the court would not give him its aid.³

§ 327. **For goods sold to an infant, when he avoids payment.** When goods are sold to an infant and he avoids pay-

¹ Buffington v. Gerrish, 15 Mass. 158.

² Farley v. Lincoln, 51 N. H. 579; Barrett v. Warren, 3 Hill, 350; Poor v. Woodburn, 25 Vt. 240. Where the sale is procured through fraudulent representations, if the vendee holds nothing of any value he may sustain replevin or trover without demand, because the taking was tortious. Thayer v. Turner, 8 Met. 550.

³ Marienthal v. Shafer, 6 Iowa, 226.

ment on the ground of infancy, the seller may rescind the sale and replevy the goods.¹

§ 328. **For goods obtained by duress.** When a party falsely and maliciously, without probable cause, sue out a warrant regular in form and cause the arrest of another, and thereby induce him to deliver goods to obtain his release, the party so defrauded may sustain replevin for his goods,² as the law will not permit the use of its process to aid in the perpetration of a fraud.³ The law, however, will not aid a party to enforce a contract made to defraud others. When the property is sold without consideration for the purpose to defraud creditors, the purchaser cannot sustain replevin.⁴

§ 329. **The general rule stated.** The rule is concisely stated in a Pennsylvania case. "When an apparent state of ownership of property produced by the consent or collusion is the means of deceiving third persons, the owner cannot enforce his rights against such persons in replevin."⁵

§ 330. **Fraudulent intention of purchaser must exist to avoid a sale.** Where a party, believing himself to be solvent, orders goods on credit which are shipped and delivered to him, his subsequent insolvency or inability to pay will not be ground for rescinding the contract of sale. In such case, if the purchaser receives the goods and executes a note, or accepts draft in compliance with the terms of the contract, the vendors cannot in the absence of fraud at the time of the purchase, annul the contract and sustain replevin, even though the purchaser knew himself to be insolvent at the time of receiving the goods and accepting the draft.⁶ If the purchaser, at the time of the arrival of the goods, knowing himself to be insolvent, should refuse to accept them, and direct their return to the vendor, the sale would be incomplete, and the vendor might maintain replevin as against any creditor who should

¹ *Badger v. Phinney*, 15 Mass. 359.

² *Foshay v. Ferguson*, 5 Hill, 156.

³ *Watkins v. Baird*, 6 Mass. 506.

⁴ *Payne v. Bruton*, 5 Eng. (10 Ark.) 53.

⁵ *Dannels v. Fitch*, 8 Pa. St. 497.

⁶ *Greaner v. Mullen*, 15 Pa. St. 206.

attempt to seize upon them. Such a course met the approval of Lord MANSFIELD.¹ Or perhaps the receiving of the goods by the vendee and placing them in his warehouse, separate and apart from his goods, with a view to their return intact, with the intent only to protect them from loss or injury until they could be returned, would be sufficient to entitle the vendors to reclaim them against creditors who might seize them.² Mere omission to disclose insolvency will not avoid a sale, a purchase made during an honest though hopeless attempt to continue business, where no questions are asked of the purchaser, is not fraudulent. There must be some positive fraudulent representation.³

§ 331. **Diligence required of one who would rescind a sale for fraud, return or tender of the consideration.** The party who would assert his title to property which has been obtained from him by fraud must exercise a certain degree of diligence to ascertain and protect his rights or he will be held to have waived or lost them. When the plaintiff claimed that a horse was stolen from him by R. in a suit against one who claimed to be a *bona fide* purchaser from R., the fact that the plaintiff had neglected for several years to proceed against R. who was responsible, and who lived in the same county, was held proper defense.⁴ Where a party seeking to rescind a sale on the ground of fraud has received any valuable consideration for the property, he must put the other party in as good condition as he was before by restoring to him whatever he has paid on the contract. Thus, where the vendor charges fraud, and seeks to set aside a sale for which the purchaser has given his note, he must return the note.⁵ The party seeking to rescind is not required, however, to deliver the note or other

¹ Harman v. Fishar, 1 Cowper, 117.

² James v. Griffin, 2 Mees & W. 622.

³ Nichols v. Pinnon, 18 N. Y. 295; Conyers v. Ennis, 2 Mason, 237; Powell v. Bradlee, 9 Gill & J. (Md.) 220.

⁴ Welker v. Wolverkuehler, 49 Mo. 35; Smith v. Field, 5 Term R. 403, (211); Furniss v. Hone, 8 Wend. 248; Mackinley v. M'Gregor, 3 Whart. (Pa.) 368; Coghill v. Boring, 15 Cal. 213. Compare Marston v. Baldwin, 17 Mass. 611.

⁵ Nichols v. Michael, 23 N. Y. 264; Wilbur v. Flood, 16 Mich. 40.

consideration in advance of obtaining the goods sold.¹ And the current of authorities hold it is sufficient if the offer to surrender be made on the trial.² Where the fraudulent party has so complicated the transaction that the others cannot restore, the law will only require him to restore as far as he can;³ but unless the tender be made before verdict it will be too late, and the defendant may have a new trial.⁴

§ 332. **What amounts to a return of property.** A party claiming to be damaged by false representations in a horse trade, must return the horse he received. Merely leaving it in the defendant's yard without any notice of his purpose to rescind the contract, although he sued the defendant at the time, is not a rescission within the meaning of the rule. Had he tendered the horse to defendant, or taken reasonable means to do so, and the defendant had avoided him, it might have been sufficient.⁵ He must put the other party in the same condition he was before, *i. e.*, he must restore what he received before he can sustain replevin.⁶

§ 333. **Does not lie against an innocent purchaser from a fraudulent purchaser.** The right of a vendor to recover from one who fraudulently purchases his goods with the intent not to pay for them, is clear and well settled, but when the fraudulent purchaser has sold and transferred the goods to another, who has no notice of the fraud and who has paid value for them, the question as to the respective rights of the deceived vendor and the innocent purchaser, presents more difficulty.⁷

¹ *Poor v. Woodburn*, 25 Vt. 239.

² *Weed v. Page*, 7 Wis. 511; *Nichols v. Michael*, 23 N. Y. 264; *Jennings v. Gage*, 13 Ill. 611; *Nellis v. Bradley*, 1 Sandf. (N. Y.) 560; *Thurston v. Blanchard*, 22 Pick. 20; *Coghill v. Boring*, 15 Cal. 217; *Kimball v. Cunningham*, 4 Mass. 502; *Poor v. Woodburn*, 25 Vt. 235; *Voorhees v. Earl*, 2 Hill, 288; *Buchenau v. Horney*, 12 Ill. 337; *Ryan v. Brant*, 42 Ill. 79; *Smith v. Doty*, 24 Ill. 163; *Matteawan Co. v. Bentley*, 13 Barb. 641.

³ *Masson v. Bovet*, 1 Denio, 73.

⁴ *Ayres v. Hewett*, 19 Me. 286; *Manning v. Albee*, 11 Allen, 520.

⁵ *Thayer v. Turner*, 8 Met. 553; *Perley v. Balch*, 23 Pick. 283.

⁶ *Conner v. Henderson*, 15 Mass. 320; *Kimball v. Cunningham*, 4 Mass. 502; *Thayer v. Turner*, 8 Met. 552; *Thurston v. Blanchard*, 22 Pick. 18.

⁷ Consult *Mitchell v. Worden*, 20 Barb. 253; *Nichols v. Pinner*, 18 N. Y. 295; *Malcom v. Loveridge*, 13 Barb. 372; *Jennings v. Gage*, 13 Ill. 611;

§ 334. The distinction between acquiring goods by theft or trespass, or by fraudulent purchase. Where goods are acquired by theft or robbery, the taker, as we have seen, acquires no title and can convey none, but where goods are bought, and the vendor of his own act delivers them to the purchaser with bill of sale or other evidences of ownership, no matter what fraudulent practices have induced the sale and delivery, the purchaser takes a title, voidable it is true, at the pleasure of the defrauded vendor, but until declared void by him, it is perfectly good as against all others. If, therefore, while the property is so in the hands of the purchaser, and before the original owner knows of or has time to rescind the sale, the goods are sold and delivered to an innocent third party who pays full value for them, the latter is not regarded as a wrongful taker or detainer, and the current of authorities is that as against him, *replevin* will not lie.¹

§ 335. The same. Observations upon this rule. There have been decisions which hold, that he who purchases from one who acquired possession of the goods by fraudulent purchase from the owner, is in all respects treated as a trespasser; that he cannot avail himself of the conveyance to justify or excuse the taking.² In *Saltus v. Everett*, 20 Wend. 275, Senator VERPLANK said: "An honest purchaser under a defective title cannot hold against the true owner." There is no general principle of law or equity that the right of a *bona*

Ohio & Miss. R. R. Co. v. Kerr, 49 Ill. 458; *Powell v. Bradlee*, 9 Gill. & J. (Md.) 220; *Shufeldt v. Pease*, 16 Wis. 659. *Bona fide* purchaser holds. *Butters v. Haughwout*, 42 Ill. 18; *Kranert v. Simon*, 65 Ill. 344; *Brundage v. Camp*, 21 Ill. 330; *Burton v. Curyea*, 40 Ill. 320; *Powell v. Bradlee*, 9 Gill. & J. (Md.) 220.

¹ *Saltus v. Everett*, 20 Wend. 267, *Sargent v. Sturm*, 23 Cal. 362; *Covill v. Hill*, 4 Denio, 323; *Johnson v. Peck*, 1 Woodbury & M. C. C. 334, *Ingersoll v. Emmerson*, 1 Carter, (Ind.) 77; *Nash v. Mosher*, 19 Wend. 433; *Hyde v. Noble*, 13 N. H. 494; *Hurst v. Gwennap*, 2 Starkie, 306; *Root v. French*, 13 Wend. 570; *Mowrey v. Walsh*, 8 Cow. 238; *Neal v. Williams*, 18 Me. 391; *Farley v. Lincoln*, 51 N. H. 576; *Cobb v. Dows*, 10 N. Y. 339; *Williams v. Merle*, 11 Wend. 80; *Covill v. Hill*, 4 Denio, 323; *Deshon v. Bigelow*, 8 Gray, (Mass.) 159.

² *McKnight v. Morgan*, 2 Barb. 171; *Galvin v. Bacon*, 11 Me. 28; *Lee v. Portwood*, 41 Miss. 109.

fide purchaser shall be regarded as superior to the prior right of the legal owner. To say that of two innocent men, he should suffer most who trusts most, would authorize anyone to purchase from a fraudulent bailee if this rule be taken in the generally received acceptance of the doctrine. But does he trust more who delivers possession of his goods to a bailee when the goods themselves are easily identified, or he who parts with his money for goods upon the simple fact that the vendor has possession of them. The rule should be, that as between two equally innocent men, his right should prevail which is prior in point of time.¹ He who has been led to part with his goods by fraud has not committed a fault, but suffered a misfortune.

§ 336. **The same.** The same question was presented in Arkansas, where it was said: "It has been contended that the owner has consented to the taking; and if that were so, it would be a sufficient reply in replevin, at least for taking. In an action against an innocent purchaser of chattels without notice, and with no agency in the trespass, we can find no authority which would authorize a recovery in an action of trespass, and therefore conclude that replevin for an unlawful taking is not supported by such proof."² Notwithstanding the preceding cases to the contrary, the rule is supported by a large preponderance of the authorities that, as against an innocent purchaser of a chattel from a fraudulent purchaser, without notice of any adverse claim, and with no agency in the fraud by which they were obtained, there is no authority to authorize a recovery.³ The loss must fall on him who was foolish enough to part with his goods before he had security.⁴

¹ *Ash v. Putnam*, 1 Hill, 302.

² *Trapnall v. Hattier*, 1 Eng. (Ark.) 23.

³ *Harrison v. M'Intosh*, 1 Johns. 384; *Ditson v. Randall*, 33 Me. 202; *Bristol v. Wilsmore*, 1 Bar. & C. 515; *Kilby v. Wilson*, Ry. & Moody, (N. P.) 178-181.

⁴ *Jennings v. Gage*, 13 Ill. 610; *Harris v. Smith*, 3 S. & R. (Pa.) 21; *Brundage v. Camp*, 21 Ill. 331; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Butters v. Houghwout*, 42 Ill. 18; *Burton v. Curryea*, 40 Ill. 320; *Arendale v. Morgan*, 5 Sneed, (Tenn.) 704; *Malcom v. Loveridge*, 13 Barb. 372; *Keyser v. Harbeck*, 3 Duer, 373; *Williams v. Given*, 6 Gratt. 268; *Jennings v. Gage*,

§ 337. **The same.** A contract originating in fraud may be rescinded at the option of the injured party, and the seller may reclaim the goods, provided the rights of a third party, as a *bona fide* purchaser, have not intervened. But the right of the seller to rescind exists only so long as the goods are in the hands of the fraudulent purchaser. Until the seller has made use of his option to rescind the sale, the purchaser, no matter what fraud has been practiced, takes a title which may or may not be ratified by the vendor; and if, while so holding, he sells to a *bona fide* purchaser for value, it will pass title.¹ In *Chicago Dock Co. v. Foster*, 48 Ill. 507, the court lays down the law without qualification, that an innocent purchaser for value, from one who has fraudulently obtained the goods from the owner, will be protected in replevin by the original owner. Where certain warrants against the State of California were paid into the State treasury, and afterwards stolen, and sold by the thief to an innocent holder, who again presented them to the State officer, who, in ignorance of the fact that they had once been paid, issued other bonds for them, the State was held liable on the bonds so issued, and in an action in the nature of detinet, by the State, recovery was denied.²

§ 338. **Rule, where goods fraudulently purchased are taken in payment of a pre-existing debt.** But where goods obtained by fraud are used in payment of a pre-existing debt of the wrongdoer,³ or where they have been mortgaged or pledged, or assigned to trustees to pay the debts of the fraudulent purchaser, the owner may pursue and recover, as a purchaser for a pre-existing debt, or a pledgee or mortgagee is not regarded in the same light as a purchaser for value;⁴ and the same rule

13 Ill. 610; *Caldwell v. Bartlett*, 3 Duer. 341; *Smith v. Lynes*, 1 Seld. 41; *Kingsford v. Merry*, 34 E. L. & Eq. 607.

¹ *Meers v. Waples*, 3 Houst. (Del.) 581; *Hoffman v. Noble*, 6 Met. 75; *Root v. French*, 13 Wend. 570; *Smith v. Lynes*, 1 Seld. (N. Y.) 47.

² *State of California v. Wells, Fargo & Co.*, 15 Cal. 340.

³ *Sargent v. Sturm*, 23 Cal. 360; *Root v. French*, 13 Wend. 570; *Coddington v. Bay*, 20 Johns. 637; *Butters v. Haughwout*, 42 Ill. 18; *Durell v. Haley*, 1 Paige, 492.

⁴ *Parker v. Patrick*, 5 D. & E. 102, 175; *Somes v. Brewer*, 2 Pick. 184; *Rowley v. Bigelow*, 12 Pick. 307; *Lloyd v. Brewster*, 4 Paige, 537.

applies where goods so obtained are seized on legal process by a creditor of the fraudulent purchaser;¹ one of the reasons being, that the only consideration in these latter cases is the extinguishment of a debt which can be revived by setting aside or rescinding the transfer; and in such case the party is no worse than he was before. He is not in the situation of one who has parted with his money.²

§ 339. **Sale of goods upon condition.** Sales upon condition, express or implied, as to delivery, payment or security, are of daily occurrence. These conditions are sometimes broken by accident or design, and the effect of the breach is a question which frequently demands adjustment in the action of replevin.

§ 340. **Non-payment for goods sold on credit does not warrant a rescision of the contract.** In the absence of fraud or deceit on the part of the purchaser, simple non-payment for goods bought on credit is not sufficient to warrant a rescision of the contract. The vendor has parted with his goods under a full knowledge of all the facts, and the neglect of the purchaser to pay the stipulated price is one of the contingencies which he is presumed to have estimated, and in the absence of fraud, or the reservation of a special lien, the seller cannot recover his goods.³

§ 341. **Rule where the vendor stipulates to retain title or possession until payment.** Where, however, the vendor stipulates to retain possession until the purchase price is paid, he may sustain replevin against anyone who wrongfully takes or detains the goods from his possession in violation of the conditions of the sale.⁴ When the plaintiffs sold and delivered a safe, with the express agreement that it should remain their property until paid for, and the purchaser made no payments, but the safe was levied on under execution and sold, the plaintiffs were regarded as the owners and permitted to sustain

¹ *Durell v. Haley*, 1 Paige, 492; *Adams v. Smith*, 5 Cow. 280; *Wiggin v. Day*, 9 Gray, (Mass.) 97.

² *Farley v. Lincoln*, 51 N. H. 577.

³ *McNail v. Ziegler*, 68 Ill. 224.

⁴ *Wills v. Barrister*, 36 Vt. 220; *Jessop v. Miller*, 1 Keyes, (N. Y.) 321.

replevin;¹ and the rule is tolerably well established, that in such case sale by the conditional vendee to an innocent purchaser for value, would not debar the owner from pursuing and receiving his goods. The rule is, that when the vendor retains title, the vendee takes none, and, of course, can convey none by any sale he may make.²

§ 342. **The same. Illustrations.** Goods were sold at auction, to be paid for by note of a third party, at six months, after the goods were delivered, but before the condition had been complied with, they were seized on attachment by creditors of the buyer. The seller was allowed to sustain replevin. The delivery was not regarded as a waiver of the condition in this case.³

§ 343. **Waiver of conditions of sale.** Goods sold on condition and delivered without insisting on the condition, *held, prima facie* a waiver of the condition, liable to be explained or rebutted by proof.⁴ A firm in Omaha, bought cigars in New York, for which they were to give their note at four months. Before the goods arrived the purchaser went into bankruptcy; some days thereafter the expressman brought the goods to the store of the buyer, and the U. S. Marshal then in possession took them, the vendors were permitted to sustain replevin. The condition of the sale had not been complied with, the note of the purchaser had not been given, and the contract impliedly required the note of the defendants when

¹ Bradshaw v. Warner, 54 Ind. 58; Hodson v. Warner, 60 Ind. 214; Leven v. Smith, 1 Denio, 571; Jennings v. Gage, 13 Ill. 610; Harris v. Smith, 3 S. & R. (Pa.) 21; Tully v. Fairly, 51 Ind. 311.

² Deshon v. Bigelow, 8 Gray, 159; Hotchkiss v. Hunt, 49 Me. 213; Rowe v. Sharp, 51 Pa. St. 27; Coghill v. Hartford & N. H. R. R., 3 Gray, 545; Sargent v. Metcalf, 5 Gray, 366; Burbank v. Crooker, 7 Gray, 158; Holmark v. Molin, 5 Cold. (Tenn.) 482; Eaton v. Munroe, 52 Me. 63; Meldrum v. Snow, 9 Pick. 441.

³ Hill v. Freeman, 3 Cush. 257; Keeler v. Field, 1 Paige, (Ch.) 312; Hussey v. Thornton, 4 Mass. 405; Marston v. Baldwin, 17 Mass. 606; Smith v. Dennie, 6 Pick. 262; Copland v. Bosquet, 4 Wash. C. C. 588; Harris v. Smith, 3 S. & R. (Pa.) 20.

⁴ Pitt v. Owen, 9 Wis. 152; Lupin v. Marie, 6 Wend. 77; Smith v. Lynes, 1 Seld. 43; Kinsey v. Leggett, 71 N. Y. 887; Ives v. Humphreys, 1 E. D. Smith, 196; Leven v. Smith, 1 Denio, 571.

solvent, not bankrupt.¹ Where goods are sold for cash on delivery, and the proof tends to show a usage or custom of delivering the goods without demanding instant payment, and goods so sold are actually delivered without payment at the time of delivery, the court may leave it to the jury to determine whether the delivery was made in reference to the usage, and no waiver of the cash payment, or whether the delivery was unconditional. If the delivery was with reference to the usage, and without intention to pass title, replevin will lie.² From these and kindred cases the general rule may be gathered, that a sale of goods upon condition does not vest the title in the purchaser until the condition shall have been complied with. That in the keeping of conditions even where they are express, some latitude is allowed, and the seller does not forfeit his right by reasonable confidence in the integrity of the purchaser and his ability to keep his contract; and if in such case the buyer refuse to perform the conditions, the seller may rescind the bargain and retake his goods. If, however, the seller do any act amounting to a waiver of the conditions, he forfeits his right to pursue his goods.

¹ *Sutro v. Hoile*, 2 Neb. 190. See *Farley v. Lincoln*, 51 N. H. 579.

² *Powell v. Bardlee*, 9 Gill. & J. (Md.) 220.

CHAPTER XIII.

THE DEMAND.

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§ 344. **Demand; general principles of the law requiring it.** There are many cases where it is necessary, before commencing suit, to make a demand upon the defendant for the delivery of the property, and the question whether such demand is necessary or not ought always to be fully considered. The effect of a failure to make and prove a demand in cases where the defendant is entitled to it, may be to lose an otherwise good case. The fact that the defendant has the possession of goods raises no presumption that he came wrongfully by them, nor does it raise any inference that he will detain them against the owner's demand.¹ The primary object of a demand, independent of the legal rights of the other party, is to obtain the goods without suit, and it should be made in all cases where there is a reasonable belief that it will result in a delivery of the goods, with few probabilities that their possessor will remove or secrete them. A demand is necessary in many cases to afford the defendant an opportunity to restore the goods to the rightful owner, or to make satisfaction if he desires to do so. In all cases where a party is in the possession of the goods of another the law presumes that he will at once deliver them to the owner on request; and this presumption is so strong that it will not allow such possessor to be put to the expense of defending a suit until the opportunity has been offered him to save costs and avoid litigation by a surrender.²

§ 345. **Demand not necessary when the defendant's possession is wrongful; otherwise it is necessary.** The general rule may be stated that when the defendant's possession has been acquired through force or fraud, or though rightful in its inception, the defendant has subsequently done any act amounting to a conversion of the property to his own use, or intended

¹ *Amos v. Sinnott*, 4 Scam. 441.

² *Thompson v. Shirley*, 1 Esp. N. P. C. 31; *Stanchfield v. Palmer*, 4 Greene, (Iowa,) 24; *Homan v. Laboo*, 1 Neb. 208; *Pringle v. Phillips*, 5 Sandf. (N. Y.) 157.

to deprive the rightful owner of his goods, demand is not necessary.¹ But where the defendant's possession was rightfully acquired, and where he has been guilty of no wrongful act towards the plaintiff's rights, a demand is usually necessary before suit can be sustained.² Thus, where the defendant acquires possession by means of a lease from the owner, he is entitled to a demand before being subjected to a suit. Ordinarily this is the case after the lease has expired.³ But a servant who quits his master, taking with him his master's goods, is liable without demand.⁴ And where a machine was delivered to one through mistake of an expressman, and he encouraged the delivery and afterwards made repairs upon

¹ *Bussing v. Rice*, 2 Cush. 48; *Thurston v. Blanchard*, 22 Pick. 18; *Ayres v. Hewett*, 19 Me. 281; *Foshay v. Ferguson*, 5 Hill, 158; *Stillman v. Squire*, 1 Denio, 328; *Cummings v. Vorce*, 3 Hill, 282; *Pierce v. Van Dyke*, 6 Hill, 613; *Trudo v. Anderson*, 10 Mich. 358; *Ballou v. O'Brien*, 20 Mich. 304; *Le Roy v. East Sag. R. R.*, 18 Mich. 239; *Clark v. Lewis*, 35 Ill. 417; *Bruner v. Dyball*, 42 Ill. 36; *Gibbs v. Jones*, 46 Ill. 320; *Seaver v. Dingley*, 4 Green. (Me.) 314; *Griswold v. Boley*, 1 Blake, (Montana,) 546; *Hicks v. Britt*, 21 Ark. 422; *Farrington v. Payne*, 15 Johns. 432; *White v. Brown*, 5 Lans. 78; *Connah v. Hale*, 23 Wend. 462; *Bates v. Conkling*, 10 Wend. 390; *Lewis v. Masters*, 8 Blackf. 246; *Delancey v. Holcomb*, 26 Iowa, 96; *Smith v. McLean*, 24 Iowa, 322; *Stanchfield v. Palmer*, 4 Greene, (Iowa,) 25; *Lawson v. Lay*, 24 Ala. 188; *Gardner v. Boothe*, 31 Ala. 190; *Oleson v. Merrill*, 20 Wis. 462; *Whitney v. McConnell*, 29 Mich. 13; *Gilmore v. Newton*, 9 Allen, 171; *Stanly v. Gaylord*, 1 Cush. 549; *Riley v. Boston Water P. Co.*, 11 Cush. 11; *Henry v. Fine*, 23 Ark. 419; *Courtis v. Cane*, 32 Vt. 232; *Boise v. Knox*, 10 Met. 41; *Fernald v. Chase*, 37 Me. 292; *Parsons v. Webb*, 8 Me. 39; *Baldwin v. Cole*, 6 Mod. 212; *Partridge v. Swazey*, 46 Me. 414.

² *Brown v. Cook*, 9 Johns. 361; *Boughton v. Bruce*, 20 Wend. 234; *Pierce v. Van Dyke*, 6 Hill, 613; *Stanchfield v. Palmer*, 4 Greene, (Iowa,) 25; *Smith v. McLean*, 24 Iowa, 323; *Gilchrist v. Moore*, 7 Iowa, 11; *Sluyter v. Williams*, 1 Swcney, (N. Y.) 215; *Stapleford v. White*, 1 Houston, (Del.) 238; *Windsor v. Boyce*, 1 Houst, (Del.) 605; *Johnson v. Johnson*, 4 Har. (Del.) 171; *Sopris v. Truax*, 1 Colorado, 90; *Roach v. Binder*, 1 Colorado, 322; *Newman v. Jenne*, 47 Me. 520; *Seaver v. Dingley*, 4 Green. (Me.) 307; *Pirani v. Barden*, (5 Ark.) Pike, 81; *Burr v. Daugherty*, 21 Ark. 564; *Hudson v. Maze*, 3 Scam. 582; *Ingalls v. Bulkley*, 13 Ill. 317; *Smith v. Welch*, 10 Wis. 91; *Stratton v. Allen*, 7 Minn. 502; *Root v. Bonnema*, 22 Wis. 539; *Walpole v. Smith*, 4 Blackf. 306; *Litterel v. St. John*, Ib. 327; *Conner v. Comstock*, 17 Harrison, (Ind.) 90; *Bond v. Ward*, 7 Mass. 127; *Sawyer v. Merrill*, 6 Pick. 478.

³ *White v. Brown*, 5 Lans. (N. Y.) 78.

⁴ *Pilsbury v. Webb*, 33 Barb. 214.

it, the taking was wrongful and no demand was necessary.¹ Or where one acquire possession of property, and without legal right assert a claim inconsistent with the owner's rights, the possession from that moment is wrongful, and no demand is necessary.²

§ 346. **The reasons for the rule.** The reasons for this general rule are plain. If the original taking was lawful, then the possession under that taking must be rightful until some other person with a better right has asserted his claim by asking that the goods be delivered to him. The law presumes that the defendant who rightfully acquired possession will respect the rights of the true owner on being informed of them, and deliver the possession at once on request. At least he must have an opportunity to do so before he is put to cost of a suit. If, however, he refuses to comply with the demand, or if, after knowledge of the plaintiff's right, he does any act which amounts to a conversion of the property to his own use, his possession from that moment becomes wrongful as against the true owner.³ Again, where the defendant's possession was rightfully acquired, his subsequent possession continues to be rightful until he shall have done some act inconsistent with the owner's rights; and while his possession so continues to be rightful no action which requires for its support proof of a wrongful detention, can lie; so when a demand is required the defendant's possession continues to be rightful up to the time of demand, and until he can have a reasonable opportunity to comply with it. Therefore, when a demand is necessary, it must be made before the suit is begun.⁴

§ 347. **The same.** So careful is the law of the rights of innocent holders, that in many cases it will not permit the owner to recover his property even when wrongfully taken from him, until after he shall have made demand for it.

¹ *Purvis v. Moltz*, 5 Robts. (N. Y.) 653.

² *Shoemaker v. Simpson*, 16 Kan. 43.

³ *Pringle v. Phillips*, 5 Sandf. (N. Y.) 161; *Woodward v. Woodward*, 14 Ill. 466; *Poole v. Adkisson*, 1 Dana, (Ky.) 110; *Hosmer v. Clarke*, 2 Green (Me.) 308.

⁴ *Brown v. Holmes*, 13 Kan. 483; *Windsor v. Boyce*, 1 Houst. (Del.) 605; *Alden v. Carver*, 13 Iowa, 255.

Thus, when the owner of a chattel wrongfully taken from him finds it in the possession of one who acquired it in good faith, by purchase, and in ignorance of the owner's right, a demand is necessary before bringing the action.¹ But this rule does not apply to stolen goods, nor can it be said to be the law in all the States.²

§ 348. **Proof of a wrongful taking sufficient.** While the foregoing is perhaps accurate as a general statement, yet the decisions vary so widely in the different States, that statement of a rule applicable to all cases is impossible. General principles, however, can be stated, which it is hoped will be a sufficient guide. The difference between the action for the wrongful taking, *i. e.*, in the *cepit*, and for the wrongful detention, *i. e.*, in the *detinet*, has been stated.³ When the action is for a wrongful taking, proof of an actual or constructive wrongful taking by the defendant will be sufficient, without proof of a demand. This rule also holds when the form of the action is for the detention. The plaintiff may, if he so elect, sue in the latter form of action, when his goods have been wrested from him, and may sustain his action without proof of a demand, proof of the wrongful taking being sufficient,⁴ as the law will presume from proof of a wrongful taking, that the goods continue in the taker's possession, and that he remains of the same purpose of mind in which he committed the wrong.⁵ But such proof is not admissible for the purpose of affecting the question of damages.⁶

¹ *Stanchfield v. Palmer*, 4 Gr. (Iowa,) 24; *Wood v. Cohen*, 6 Ind. 455; *Ingalls v. Bulkley*, 13 Ill. 315.

² Compare *Lewis v. Masters*, 8 Blackf. 245; *Riley v. Boston Water P. Co.*, 11 Cush. 11; *Courtis v. Cane*, 32 Vt. 232; *Harding v. Coburn*, 12 Met. 342; *Hoare v. Parker*, 2 T. R. 376; *Hudson v. Maze*, 3 Scam. 582; *Kelsey v. Griswold*, 6 Barb. 440; *Hall v. Robinson*, 2 Comst. (N. Y.) 295.

³ See *ante*, § 53.

⁴ *Stillman v. Squire*, 1 Denio, 328; *Oleson v. Merrill*, 20 Wis. 462; *Cummings v. Vorce*, 3 Hill, 282; *Lewis v. Masters*, 8 Blackf. 245; *Pierce v. Van Dyke*, 6 Hill, 613; *Zachrisson v. Ahman*, 2 Sandf. 68; *Pringle v. Phillips*, 5 Sandf. 157.

⁵ *Paul v. Luttrell*, 1 Col. 320.

⁶ *Eldred v. The Oconto Co.*, 30 Wis. 206.

§ 349. **The legal effect of a demand and refusal.** A demand and refusal is not a conversion, nor does it produce a conversion.¹ The refusal is interpreted by the law as a declaration on the part of the person refusing, that he intends to make use of the property for his own benefit, and for this the law will hold him responsible as for an actual conversion. Proof of an actual conversion will always obviate the necessity of proving a demand and refusal.² When, therefore, the defendant has notice of the plaintiff's rights, any act done for the purpose of defeating them, will amount to a conversion; but where the defendant acts in ignorance of the claim of any other person and in the honest belief that the goods are his, an actual conversion, or a demand and refusal must be proved before the plaintiff can sustain an action. *Kennet v. Robinson*, 2 J. J. Marsh, (Ky.) 84, is one of the most interesting cases on the question of "what is a conversion," that is to be met with. The court there holds in substance, that to constitute conversion there must be a taking without the owner's consent, or an assumption of ownership, or an illegal use or abuse of the property, and that in the absence of such proof, there must be proof of a demand and refusal to deliver.

§ 350. **Where possession is taken by a thief or trespasser from another thief or trespasser.** If goods be taken by a thief or trespasser from another thief or trespasser, the owner may have trespass or replevin against the last taker without demand.³

§ 351. **Where goods are converted no demand necessary; meaning of the term "conversion" as here used.** The term "conversion" as here used does not imply a change of condition in the goods, but simply that they have been appropriated by the party to his own use. If one take corn and refuse to deliver it to the owner on demand, it is a conversion. If he manufacture whisky from it and deliver it on request, it

¹ *Morris v. Pugh*, 3 Burr. 1241; *Savage v. Perkins*, 11 How. Pr. 17; *Perkins v. Barnes*, 3 Nev. 557; *Bruner v. Dyball*, 42 Ill. 35; *Lockwood v. Bull*, 1 Cow. 322; *Hill v. Covell*, 1 Comst. (N. Y.) 523; *Jessop v. Miller*, 1 Keyes, (N. Y.) 321. *Contra*, *Baldwin v. Cole*, 6 Mod. 212.

² *Bristol v. Burt*, 7 Johns. 257; *Gilmore v. Newton*, 9 Allen, (Mass.) 171.

³ *Barrett v. Warren*, 3 Hill, (N. Y.) 348.

is no conversion. Proof of a refusal simply raises a legal presumption that the defendant has converted the property.

§ 352. **What is a conversion.** The question then presents itself, what proof, aside from a demand, will be sufficient to convict the defendant of a conversion? As a general rule, to render the defendant guilty of conversion, he must have done some positive tortious act. Negligence, or a mere omission, is not usually sufficient.¹ When a carrier loses a box entrusted to him, such loss, however negligent, does not amount to a conversion.² But under ordinary circumstances, where property is under the control of the defendant, a willful neglect to deliver on request, or to point out the property, or act in its delivery, will, if unexplained, amount to a conversion and excuse proof of a demand.³ One having the right to exclusive possession of a building, in which another's goods are stored, may exclude the owner of the goods from the building, and such exclusion will not necessarily be a conversion of the goods;⁴ and an action of replevin for the goods would require some further support than proof of a refusal to admit into the building.⁵

§ 353. **There can be no conversion without actual control over, or interference with, the property.** There can never be an actual conversion of property without an actual possession of it, or the exercise of some control or dominion over it. A mere declaration of ownership by one not in possession, or an assertion of intention to take possession, without any actual interference with it, will not amount to a conversion.⁶ A levy by an officer upon goods which he does not see, or in any way

¹ *Jones v. Allen*, 1 Head. (Tenn.) 628; *Lockwood v. Bull*, 1 Cow. 322. Consult *Gilmore v. Newton*, 9 Allen, 171, and cases cited; *Youl v. Harbottle*, Peakes N. P. Cas. 49; *Presley v. Powers*, 82 Ill. 125.

² *Packard v. Getman*, 4 Wend. 615; *Ross v. Johnson*, 5 Burr. 2837; *Kirkham v. Hargraves*, 1 Selw. N. P. 425; *Dwight v. Brewster*, 1 Pick. 50, 53.

³ *Mitchell v. Williams*, 4 Hill, (N. Y.) 16; *Holbrook v. Wight*, 24 Wend. 169.

⁴ *Bent v. Bent*, 44 Vt. 634.

⁵ *Bent v. Bent*, 44 Vt. 634.

⁶ *Fernald v. Chase*, 37 Me. 289; *Fuller v. Tabor*, 39 Me. 521; *Simmons v. Lettystone*, 4 Exch. 442; *Rogers v. Huie*, 2 Cal. 571; *Heald v. Cary*, 11 Com. B. 993; *Presley v. Powers*, 82 Ill. 125.

interfere with, is no conversion.¹ Neither will a conspiracy, however atrocious, to take or destroy property, confer a right of action, unless some act to the injury of the party be done under it.²

§ 354. **Illustrations of this rule.** When plaintiff's sheep broke out of his lot and mingled with those of defendant's, which were being driven along the highway, although the latter allowed them to go with his sheep to his lot, where they were separated and driven back toward the direction from whence they came, it was held no conversion.³ When cattle break into the field of another, and destroy corn, it cannot be said that their owner converted the corn, because his cattle ate it.⁴ When a horse was conveyed as security for a debt, the debtor to retain possession, castration of the horse, pending the time, is a conversion, and the lender may retake possession in replevin.⁵ So, when a horse had been leased for a term, upon an agreement to divide the profits of his services, and the lessee permitted it to be sold on execution, *held* a conversion.⁶

§ 355. **The same.** It is not every taking that amounts to a conversion. A simple taking, without any intention to use property, or to injure or damage it, or delay or affect its owner's rights, would not be a conversion.⁷ A trespass, however gross, is not necessarily a conversion. Under the law, generally, in this country, a taking, unaccompanied by a detention, is not a conversion.⁸ Plaintiff paid the fare for himself and two horses on a ferryboat; the ferryman told him to remove his horses, he would not carry them. Plaintiff refused; thereupon the ferryman removed them, while plaintiff remained, and was carried over. *Held*, that it was not conversion, unless

¹ *Herron v. Hughes*, 25 Cal. 556.

² *Hutchins v. Hutchins*, 7 Hill, (N. Y.) 104.

³ *Van Valkenburgh v. Thayer*, 57 Barb. 196.

⁴ *Smith v. Archer*, 53 Ill. 244.

⁵ *Ripley v. Dolbier*, 18 Me. 382.

⁶ *Hutchinson v. Bobo*, 1 Bailey, (S. C.) 546.

⁷ *Eldridge v. Adams*, 54 Barb. 417.

⁸ *Bogan v. Stoutenburgh*, 7 Ohio, Pt. 2, 213; *State v. Jennings*, 14 Ohio St. 77; *Paul v. Luttrell*, 1 Col. 317; *Nelson v. Iverson*, 17 Ala. 219.

the taking was with the intent to convert to the taker's use. Trespass might lie, but not trover or replevin.¹ A neglect or refusal to deliver goods which are not in the defendant's possession at the time of the demand is not a conversion.²

§ 356. **Purchaser at sheriff's sale.** A mere purchaser at a sheriff's sale, who does nothing more than purchase, is not a trespasser, even though the seizure and sale by the officer may have been wrongful, and the sale convey no title. If, upon such sale, the sheriff delivers the property to the purchaser, a demand must be made of him before suit.³ When, however, one obtains goods by trespass, and they are subsequently sold by the officer on execution against the trespasser, and bought by the plaintiff in execution, a want of demand will not defeat the suit.⁴ The purchase, in such case, was only the extinguishment of a prior debt, and not a purchase for cash.⁵

§ 357. **Possession taken simply as an act of charity, or to preserve property, not a conversion.** Where one takes possession of property as an act of charity or kindness, or for the purpose of preserving what would otherwise suffer damage, it is no conversion. There is no wrongful act or intention, which is an essential ingredient in an action for wrongful taking or detention. Consequently a demand must be made.⁶

§ 358. **Borrower cannot set up title in himself as against his bailor.** A borrower or a bailee for hire, cannot set up title in himself against his bailor. He must first restore the property. And while a demand is necessary in such cases, when the defendant has done no act amounting to a conversion, a claim of ownership, in defiance of the rights of lender or hirer, is equivalent to a conversion, and renders a demand unnecessary.⁷

¹ *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Eldridge v. Adams*, 54 Barb. 417.

² *Whitney v. Slauson*, 30 Barb. 276; *Hawkins v. Hoffman*, 6 Hill, 586; *Hall v. Robinson*, 2 Comst. (N.Y.) 293; *Hill v. Covell*, 1 Comst. 522; *Walker v. Fenner*, 20 Ala. 198.

³ *Talmadge v. Scudder*, 38 Pa. St. 518.

⁴ *Sargent v. Sturm*, 23 Cal. 360.

⁵ See *ante*, § 383.

⁶ *Kennet v. Robinson*, 2 J. J. Marsh. (Ky.) 84.

⁷ *Simpson v. Wrenn*, 50 Ill. 224; *Loeschman v. Machin*, 2 Starkie, 310.

§ 359. **Finder of property entitled to a demand.** The finder of lost property is entitled to a demand before being subjected to a suit; but he has no lien for expenses gratuitously bestowed in taking care of it; and if he assert his intention to hold it for the purpose of enforcing such a lien, he will be guilty of conversion.¹ Salvage, as allowed in the maritime courts, stands on an entirely different basis, and is enforced only in respect to goods lost on the high seas.² When a raft broke loose from its fastenings on the bank of a river, and the defendant towed it to a place of safety, he was not permitted to set up a lien for his trouble, however meritorious his claim.³ Where, however, a reward is offered for lost property, the finder is entitled to retain possession until the reward is paid.⁴

§ 360. **Taker up of stray animals.** The taker up of an estray, who fails to comply with the law with respect to such animals, has no lien for his trouble or expense. He is, in fact, a trespasser.⁵ But when the defendant took up stray cattle, complying with the terms of the statute, he was entitled to a demand of possession and a tender of charges before he could be held liable in this action.⁶

§ 361. **Purchaser of property payable in installments entitled to a demand before forfeiture.** Where one bought a sewing machine, and was to pay for it in monthly installments, and paid first installment, and refused to pay the next, alleging the machine was not such as she had bought, the seller brought replevin. *Held*, it could not be sustained without proof of a demand, and an offer to refund the part of the purchase money which had been paid.⁷

§ 362. **Unauthorized interference with the goods of another.** A forcible seizure is not necessary to constitute a wrongful

¹ *Etter v. Edwards*, 4 Watts. (Pa.) 66, citing *Binsted v. Buck*, 2 W. Blacks. 1117.

² *Hartford v. Jones*, 1 Ld. Raym. 393.

³ *Nicholas v. Chapman*, 2 H. Bla. 254.

⁴ *Cummings v. Gann*, 52 Pa. St. 484.

⁵ *Bayless v. Lefavre*, 37 Mo. 119.

⁶ *Holcomb v. Davis*, 56 Ill. 416.

⁷ *Hamilton v. Singer Sewing Machine Co.*, 54 Ill. 370.

taking;¹ but any unlawful or unauthorized intermeddling with or exercise of authority over the property of another is an act of trespass, and if accompanied by taking and detention, will amount to a conversion.²

§ 363. One who hires property for a special purpose cannot use it for another. When a person hired a horse for a specified journey, and drove it beyond, it was held a conversion. So, if the defendant wrongfully set up a claim for a lien on the property, in reply to a demand for it, it is sufficient evidence of a conversion.³ When the owner demanded his machinery from defendants, who refused to allow him to take it until they had got other in its place: *Held*, to be an unlawful intermeddling with the plaintiff's property, without any pretense of right, and sufficient to sustain an action.⁴

§ 364. Innocent receiver of stolen goods may be liable for conversion. This rule has been carried so far, that a person who receives stolen goods in ignorance of the owner's rights, has been held liable for them. Thus, an auctioneer who receives goods from a thief in the ordinary course of business, and sells them, and pays the proceeds to the thief, without any notice or knowledge, was held liable for conversion.⁵ The case of *Hoffman v. Carow* was cited approvingly in a Vermont case, and the court says that probably no case can be found in conflict with it.⁶ But where one took goods in pledge for a debt, not knowing they were the goods of a third party, and afterwards re-delivered them to his debtor, upon his promise

¹ *Lee v. Gould*, 47 Pa. St. 398; *Haythorn v. Rushforth*, 4 Har. 160; *Kerley v. Hume*, 3 T. B. Mon. (Ky.) 181; *Marchman v. Todd*, 15 Geo. 25; *Skinner v. Stouse*, 4 Mo. 93.

² *Ralston v. Black*, 15 Iowa, 48; *Squires v. Smith*, 10 B. Mon. (Ky.) 33; *Ely v. Ehle*, 3 Comst. 506; *Hardy v. Clendening*, 25 Ark. 436; *Gibbs v. Chase*, 10 Mass. 125; *Robinson v. Mansfield*, 13 Pick. 139; *Phillips v. Hall*, 8 Wend. 610; *Allen v. Crary*, 10 Wend. 349; *Fonda v. Van Horne*, 15 Wend. 631; *Neff v. Thompson*, 8 Barb. 213; *Miller v. Baker*, 1 Met. 27; *Wilson v. Barker*, 4 B. & Adolph. 614.

³ *Jacoby v. Laussatt*, 6 S. & R. 300.

⁴ *Haythorn v. Rushforth*, 4 Har. (19 N. J.) 160.

⁵ *Hoffman v. Carow*, 22 Wend. 285. *Contra*, *Rogers v. Huie*, 2 Cal. 572.

⁶ *Courtis v. Cane*, 32 Vt. 233. Consult, also, *Sprights v. Hawley*, 39 N. Y. 441.

to sell them and pay the proceeds to him, he was not liable to the owner.¹ When defendant, a jeweler, sold jewelry for A., and paid him proceeds, without notice of any other claim, he was held liable to the true owner for the value.² This rule, at first blush, may seem harsh; but an auctioneer or commission man of known responsibility ought not to lend the credit of his name to sell goods unless he knows the title will pass. If, through ignorance or carelessness, he sells stolen goods, and his customer be dispossessed, he ought to answer; and if the goods be consumed, or cannot be had by the true owner, it is by no means unjust that he make good to the owner their value, which he has lost.³

§ 365. **What is rightful possession.** It has been frequently held, that when the defendant's possession was rightfully acquired in the first instance, that the owner of the goods could not sustain an action for them without proof of demand and refusal.⁴ The application of this general rule requires the solution of the question, What is regarded as a rightful possession? The defendant may have purchased the goods from one who, to all appearances, had a lawful and perfect right to sell and deliver, although in fact the goods may have been taken from the owner by robbery or theft; or, the vendor may have acquired them from the owner by some fraudulent practice, or as bailee for some special purpose. A jeweler may sell a watch left in his hands for repair, or a carrier dispose of the goods committed to him for transportation. An officer of the law, armed with legal process against A., may seize upon the goods of B. and sell them, or deliver them to a custodian until the day of sale. In these and a multitude of kindred cases, the possession, apparently rightful, is really wrongful, and the true owner can recover, and usually without demand. The

¹ Leonard v. Tidd, 3 Met. 6.

² Bowen v. Tenner, 40 Barb. 383.

³ See Spencer v. Blackman, 9 Wend. 167; Everett v. Coffin, 6 Wend. 605; M'Combie v. Davies, 6 East, 538; Thorp v. Burling, 11 Johns. 285; Farrar v. Chauffetete, 5 Denio, 527; Pearson v. Graham, 6 Ad. & Ell. 899; Williams v. Merle, 11 Wend. 80.

⁴ Gilchrist v. Moore, 7 Clark, (Iowa,) 11; Newman v. Jenne, 47 Me. 520; Stanchfield v. Palmer, 4 Greene, (Iowa,) 25.

rules are different in different courts. It has been held that where the defendant acquired possession by purchase from one apparently the owner, such possession was so far rightful that the real owner must make demand before bringing suit;¹ but it has also been held that where one purchased property from one who had no right to sell, it was a conversion, and the owner could sustain replevin without demand, the good faith of the buyer being no defense.²

§ 366. **Fraudulent purchaser, or attaching creditor of same not entitled to demand.** When merchandise was purchased on credit, through fraudulent representations by the buyer as to his responsibility, and after delivery to him was attached by his creditors, the vendor was allowed to maintain replevin without demand.³ In a subsequent case, the right of the deceived vendor was distinctly put upon the ground of his right to rescind an otherwise valid sale; and it was held he could enforce his claim only while the goods were in the hands of the vendor, or some person with notice of his rights.⁴ In Michigan, when property is disposed of without authority by a person having it in charge, the owner may bring replevin without demand, even against an innocent purchaser.⁵ So, in Maine, the defendant, though a *bona fide* purchaser from one who had no title or right to sell, is not entitled to hold the property; the owner may recover it in replevin without demand.⁶ A

¹ Stanchfield v. Palmer, 4 Greene, (Iowa,) 24; Ingalls v. Bulkley, 13 Ill. 315; Hudson v. Maze, 3 Seam. 578; Pringle v. Phillips, 5 Sandf. (N. Y.) 157; Hall v. Robinson, 2 Comst. 295; Wood v. Cohen, 6 Ind. 455; Conner v. Comstock, 17 Ind. 90. *Contra*, Lewis v. Masters, 8 Blackf. 245; Bussing v. Rice, 2 Cush. 48; Thurston v. Blanchard, 22 Pick. 18; Buffington v. Gerrish, 15 Mass. 156; Acker v. Campbell, 23 Wend. 372.

² Gilmore v. Newton, 9 Allen, 171; Riley v. Boston Water P. Co., 11 Cush. 11; Farley v. Lincoln, 51 N. H. 577; Williams v. Merle, 11 Wend. 80. See Riford v. Montgomery, 7 Vt. 418; Doty v. Hawkins, 6 N. H. 248; Courtis v. Cane, 32 Vt. 232; Bloxam v. Hubbard, 5 East, 407; Cooper v. Newman, 45 N. H. 339; Galvin v. Bacon, 11 Me. 28; Soames v. Watts, 1 C. & Payne, 400; Stanley v. Gaylord, 1 Cush. 536; Hyde v. Noble, 13 N. H. 494.

³ Buffington v. Gerrish, 15 Mass. 158; Bussing v. Rice, 2 Cush. 48; Acker v. Campbell, 23 Wend. 372.

⁴ Hoffman v. Noble, 6 Met. (Mass.) 75.

⁵ Trudo v. Anderson, 10 Mich. 357.

⁶ Prime v. Cobb, 63 Maine, 202.

fraudulent purchaser acquires a voidable title. The fraud may justify the vendor in rescinding the sale and suing for the goods; but until rescinded, the sale is valid, and it is optional with the vendor to affirm it. So, when goods obtained through fraudulent purchase have been sold to a *bona fide* purchaser, without notice, replevin does not lie. The distinction is, that a fraudulent purchaser takes a title, voidable, nevertheless, but perfectly valid until rescinded; and if, while holding a valid title, he makes sale to one without notice, the sale is binding on the owner; but a thief or trespasser takes no title, and can convey none by any sale or delivery he may make.

§ 367. **Fraudulent taking confers no right on the taker.** While the forcible seizure of goods of another is always regarded as wrongful, it is no more so than the use of fraudulent means by which to obtain possession. He, who by successful fraud obtains the goods of another, is equally guilty of wrongfully taking with him who seizes them by superior force. It follows that in cases where the defendant fraudulently obtains possession no demand is necessary.¹ When one professed to have a warrant for the arrest of another, and under that pretense made an arrest and obtained the delivery of cattle in settlement, replevin would lie for the cattle or trover for their value, without demand.²

§ 368. **Demand necessary where an officer seizes goods from defendant named in his process.** Where an officer holding proper legal process takes goods from the possession of the

¹ *Bussing v. Rice*, 2 Cush, 48; *Acker v. Campbell*, 23 Wend. 372.

² *Foshay v. Ferguson*, 5 Hill, 158. Where the defendant derives his possession by purchase for value, and without any notice of any right or claim by any other person, his detention is usually regarded as rightful until an opportunity has been offered him to restore the goods. *Priam v. Barden*, 5 Ark. 81; *McNeill v. Arnold*, 17 Ark. 173; *Trapnall v. Hattier*, 6 Ark. 18; *O'Neill v. Henderson*, 15 Ark. 235. Where the original possession was acquired by fraud, and under circumstances which did not transfer the title from the owner, and where the goods were seized and sold on execution against the fraudulent purchaser, and purchased by the plaintiff in the execution, it would seem that the purchaser acquired no better title than the original taker had. In such a case the defendant could not claim title to the goods and resist the plaintiff in the replevin suit on the ground of a want of demand before suit. *Sargent v. Sturm*, 23 Cal. 360.

defendant named in his writ, he is but doing his duty and his possession is lawful, so that replevin cannot be maintained against him without demand.¹

§ 369. **Contra; when he seizes goods from another.** When the property is seized from one not named in the process, the latter may sustain replevin upon showing that the goods belong to him, without proof of a demand.² The taking in such case is wrongful.³

§ 370. **Innkeeper or carrier; when entitled to demand.** A carrier has a lien on goods which he has transported, though he might have demanded his charges in advance, and replevin by the consignor or owner would not lie against him without demand and payment of charges. So of an innkeeper with respect to the goods of his guest. If a thief, however, take goods and deposit them with a carrier for transportation, or become a guest at an inn, the carrier or innkeeper cannot resist the true owner nor can either assert a lien, though the action cannot in such case be sustained without demand.⁴

§ 371. **At what time demand must be made.** The demand must be made before suit is begun.⁵ When demand was made by an officer after the issuing, but before service of the writ, while he held the writ in his hands, it was held too late; the issuance of the writ is the beginning of the snit.⁶ In *Badger v. Phinney*, 15 Mass. 364, (one of the leading cases on the law of replevin,) this question arose, and the court said: "It is a sufficient answer to this, that if the defendant had delivered the goods on demand, there would have been no necessity to serve the writ." But the general rule is undoubted that where goods came lawfully into possession of

¹ *Vose v. Stickney*, 8 Minn. 75; *Daumiel v. Gorham*, 6 Cal. 43; *Taylor v. Seymour*, 6 Cal. 512; *Killey v. Scannell*, 12 Cal. 73; *Bond v. Ward*, 7 Mass. 123; *Shumway v. Rutter*, 8 Pick. 443; *Bancroft v. Blizzard*, 13 Ohio, 30.

² *Ledley v. Hays*, 1 Cal. 160; *Tuttle v. Robinson*, 78 Ill. 332.

³ *Gimble v. Ackley*, 12 Iowa, 27; *Chinn v. Russell*, 2 Blackf. (Ind.) 172; *Buck v. Colbath*, 3 Wall. (U. S.) 334.

⁴ *Robinson v. Baker*, 5 Cush. 137; *Fitch v. Newberry*, 1 Doug. (Mich.) 1.

⁵ *Chenyworth v. Daily*, 7 Porter, (Ind.) 284; *Brown v. Holmes*, 13 Kan. 482.

⁶ *Alden v. Carver*, 13 Iowa, 254; *Darling v. Tegler*, 30 Mich. 54; *Boughton v. Bruce*, 20 Wend. 234; *Cummings v. Vorce*, 3 Hill, (N. Y.) 285.

defendant, there must be a demand and refusal, or proof of conversion, before suit is brought; proof of a conversion, or refusal to deliver after suit, will not avail.¹ The demand must be made upon defendant at a time when he has it in his power to comply; his ability to comply is essential. Demand on one who did not have the property would be useless.² But proof that the defendant had parted with the goods fraudulently for the purpose of avoiding the demand, has been held sufficient to excuse demand.³ If the defendant have the goods at another place and offer to go with the plaintiff and deliver them, it will be sufficient. A refusal to deliver at the place of demand in such case, is no evidence of conversion.⁴

§ 372. **The effect of failure to prove demand.** One of the most important, and in some respects one of the most difficult questions arising in the action, is as to the effect of a failure to prove a demand. A very common opinion is, that such failure defeats the plaintiff, and that a return of the goods will necessarily follow. Decisions are not wanting which seem to sustain this view,⁵ though its correctness may well be doubted. Demand and refusal, it must be remembered, are evidence of a conversion; that is, of a conversion at some time *prior* to the refusal.⁶ The presumption as to when the conversion was actually made, ought in all cases to be such as will protect the real equities of the parties. Lord MANSFIELD once allowed proof of a demand after bill filed, holding that it was before suit was brought, (that is before service,) saying in substance, that the courts ought to make use of every presumption possible, rather than that a meritorious party should be defeated

¹ *Storm v. Livingston*, 6 John. 44; *Powers v. Bassford*, 19 How. Pr. 309; *Purves v. Moltz*, 5 Robt. (N. Y.) 653.

² *Whitney v. Slauson*, 30 Barb. 276; *Bowman v. Eaton*, 24 Barb. 528; *Hawkins v. Hoffman*, 6 Hill, 536; *Whitwell v. Wells*, 24 Pick. 29; *McArthur v. Carrie's Admr.*, 32 Ala. 87; *Harris v. Hillman*, 26 Ala. 380.

³ *Andrews v. Shattuck*, 32 Barb. 397; *Fenner v. Kirkman*, 26 Ala. 653.

⁴ *O'Connell v. Jacobs*, 115 Mass. 21.

⁵ See cases cited in notes to preceding section.

⁶ *Jessop v. Miller*, 1 Keyes, (N. Y.) 321. See *Purves v. Moltz*, 5 Robts. (N. Y.) 653.

by objections which do not relate to the real merits of the controversy.¹ Applying these rules where a demand is made shortly after the writ issued, the refusal ought, ordinarily, to be evidence of a conversion before the writ issued.² If the defendant had actually been willing to surrender, he could have said so, and saved all further litigation. Where the defendant sets up and insists on a want of proper demand, he ought in fairness to be confined to that defense, or to be required to abandon it. If he claims any lien or interest in the property, he ought not to be permitted to set it up and then recover under pretense that he would have surrendered the property if he had been requested to do so. When the defendant succeeded because of a want of a demand, he ought never to have return, unless on the clearest showing that he is entitled to such a judgment; for a defendant to recover under pretense that he would have surrendered the goods had they been demanded, and then ask that they be returned to him would seem absurd. The utmost he can ask would seem to be his costs. In cases where the plaintiff shows himself to be the owner and entitled to possession of goods had he demanded them, a mere oversight or neglect to prove demand ought not to be punished by taking his goods and handing them over to one who asserts no title. The only reason why demand is necessary in any case, is to give the defendant an opportunity to surrender without being put to costs; and while this is eminently proper, the object of the rule is fully accomplished, and the plaintiff sufficiently punished for his neglect by judgment against him for costs, without being compelled to surrender his goods.

§ 373. **Waiver of demand by defendant.** Cases often arise when the defendant would be entitled to a demand, but has done some act or made some declaration which excuses the plaintiff from making it. Proof of any circumstance which would satisfy a jury that a demand would have been unavailing (as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver,) will be sufficient to

¹ *Morris v. Pugh*, 3 Burr. 1241.

² *Badger v. Phinney*, 15 Mass. 364. See chapter entitled *Return*, *post*.

excuse this proof.¹ If a bailee sets up ownership of the goods in himself, such claim is equivalent to a conversion, and the action will lie without demand.² The plaintiff offered to prove that the defendants gave a general order to all their hands not to deliver the horse in dispute to him, or any one for him; *held*, proper to go the jury as tending to prove a conversion by defendants..³ Where parties stipulated that the goods should be sold and the proceeds paid over to the party who was entitled to them, this obviated the necessity for proof of a demand.⁴ When the defendant, by his pleading, admits a demand, proof of one is unnecessary.⁵

§ 374. **The same. Claim of ownership by defendant.** Where the defendant sets up a claim of ownership and demands a return of the goods, this claim is inconsistent with any hypotheses that he would surrender them on demand, and will obviate the necessity of proving demand.⁶ And the rule may be stated as general, that when the defendant contests the case all through the trial upon a claim of superior right to the property, he cannot afterwards set up a want of demand as a reason for his failure to surrender. When he desires to rely on a want of demand he should show a willingness to deliver the goods upon a proper one, and that none had been made.⁷

§ 375. **Upon whom the demand must be made.** As before stated, the demand must be made upon one who has possession of the goods and is able to deliver them in compliance with such demand.⁸ It should usually be made personally upon

¹ *Johnson v. Howe*, 2 Gilm. 344; *Cranz v. Kroger*, 22 Ill. 74; *La Place v. Aupoix*, 1 Johns. Ca. 407; *Appleton v. Barrett*, 29 Wis. 221; *Lutz v. Yount*, Phill. (N. C. L.) 367.

² *Simpson v. Wrenn*, 50 Ill. 224.

³ *Johnson v. Howe*, 2 Gilm. 344.

⁴ *Butters v. Haughwout*, 42 Ill. 24.

⁵ *Jones v. Spears*, 47 Cal. 20.

⁶ *Seaver v. Dingley*, 4 Green. (Me.) 307; *Smith v. McLean*, 24 Iowa, 337; *Newell v. Newell*, 34 Miss. 385; *Cranz v. Kroger*, 22 Ill. 74; *Perkins v. Barnes*, 3 Nev. 557; *Pierce v. Van Dyke*, 6 Hill, 613.

⁷ *Homan v. Laboo*, 1 Neb. 207.

⁸ *Whitney v. Slauson*, 30 Barb. 276; *Andrews v. Shattuck*, 32 Barb. 397; *McArthur v. Carriere's Admr.*, 32 Ala. 87; *Whitwell v. Wells*, 24 Pick. 29; *Lill, etc., v. Russell*, 22 Wis. 178.

the party who is expected to comply with it. A demand on defendant's wife or servant is not sufficient evidence of a conversion by the husband or master.¹ But if the party pretends he has the goods when the demand is made, and induces the plaintiff to sue him, he cannot defend on the ground that he did not have them.² When goods are bailed to the defendant a demand at the house of the bailee in his absence is not evidence of a conversion unless it be shown by circumstances, or otherwise, that he had actual notice of the demand before the suit was begun.³ But if the bailee should be guilty of any actual conversion he is answerable. When one was entrusted with a package of money for safe keeping and broke the package and appropriated the money, he was liable without demand.⁴ When goods were in the actual custody of the defendant's wife and daughter, and he absented himself from home, the wife was held his agent for purposes of demand and refusal.⁵ When the property is held by two or more defendants acting severally the demand should be upon both; but if they be partners, or acting jointly, a demand on one would be held to extend to both.⁶

§ 376. **No particular form necessary.** There is no particular form to be observed in making a demand, provided the defendant is distinctly notified what goods are wanted.⁷ A demand for B.'s stock, if not objected to, and no claim that the demand should be more specific, is sufficient.⁸ When the

¹ *Storm v. Livingston*, 6 John. 44; *Mount v. Derick*, 5 Hill, 456; *Potholier v. Dawson*, Holt, N. P. 383.

² *Hall v. White*, 3 Car. & P. 136.

³ *White v. Demary*, 2 N. H. 546.

⁴ *Shelden v. Robinson*, 7 N. H. 157. See *Graves v. Ticknor*, 6 N. H. 537; *Poole v. Adkisson*, 1 Dana, 110; *Hosmer v. Clarke*, 2 Gr. (Me.) 308.

⁵ *Goldsmith v. Bryant*, 26 Wis. 39. In this case, however, there was evidence to show a fraudulent purpose on the part of the defendant in absenting himself, with collusion on the part of the wife.

⁶ *Nisbet v. Patton*, 4 Rawle, 119; *Newman v. Bennett*, 23 Ill. 427; *Mitchell v. Williams*, 4 Hill, 13; *Holbrook v. Wight*, 24 Wend. 169.

⁷ *Colegrave v. Dias Santos*, 2 B. & C. 76; *La Place v. Aupoix*, 1 John. Ca. 407; *Thompson v. Shirley*, 1 Esp. N. P. C. 31; *Smith v. Young*, 1 Camp. 440.

⁸ *Newman v. Bennett*, 23 Ill. 428.

plaintiff said, "I have come to demand my property, here is a list of it." *Held*, sufficient. A written demand left at the defendant's house may be good.¹ It is not necessary that the plaintiff compel the defendant to go with him to point out the several articles demanded, or that he compel him to listen to a description of them. It is enough that the defendant refuses to comply, or evades the hearing of demand.²

§ 377. **General rules governing the demand.** Cases arise where the defendant come lawfully into possession, and is in ignorance of plaintiff's rights. In such case the demand ought to be accompanied by some explanation or statement, so that the plaintiff can act advisedly. For example, goods taken by trespass may have come to the defendant's possession through unquestioned sources, and for full value. An unexplained demand for such property by a stranger would be properly refused. The demand ought to be accompanied by a statement of the claim, and, under ordinary circumstances, a reasonable opportunity allowed the defendant to satisfy himself of the truth of the claimant's title.

§ 378. **The same; illustrations.** If, after demand is made for goods, the possessor answer that he is not satisfied that the person demanding is the owner, but that he is ready to deliver on reasonable proof thereof, this will not be regarded as a conversion. It is the answer of a prudent man. So, where one claims to be an agent, and demand goods for his principal, the party upon whom the demand is made may require proof of agency.³ When demand was made upon the retiring deacon of a church, that he surrender the communion service, he replied, he "would take the advice of counsel." *Held*, right and prudent.⁴

§ 379. **Demand by father or guardian.** A demand made by a father, or one who stands *in loco parentis*, is sufficient for

¹ Logan v. Houlditch, 1 Esp. N. P. C. 22; 1 Chitty Pl. 159.

² Appleton v. Barrett, 29 Wis. 221.

³ Jacoby v. Laussatt, 6 S. & R. 305; Green v. Dunn, 4 Camb. 215; Solomons v. Dawes, 1 Esp. 83; Watt v. Potter, 2 Mason C. C. 77; Ingalls v. Bulkley, 13 Ill. 316.

⁴ Page v. Grosby, 24 Pick. 216.

property of his minor children.¹ So, also, demand may be made by an agent or any one duly authorized to act for the owner. When an agent is charged with the whole duty of receiving, receipting for and delivering property, as is the case with railroad and express agents, a demand upon the agent is a demand upon the corporation.²

§ 380. **Refusal to deliver.** The true grounds therefor must be stated. When the defendant refused to deliver to the agent of the plaintiff, for the reason that the agent had no authority, his refusal must rest distinctly upon that ground. The agent will then be bound to produce his authority, or show that the defendant's refusal is captious. If he does not, defendant's refusal will be only an act of proper caution. To an unqualified refusal, however, the agent is not required to produce any authority.³

§ 381. **The same.** What is a sufficient excuse for non-delivery. When a party claims a lien on goods in his possession, he should state the amount of his lien, and the grounds upon which he bases it when the demand is made. Retention on other grounds, without such statement, will be a waiver of the lien. When work was done on a boiler, for which the defendant had a lien, as also a general account against the owner, if, at the time of the demand, he insisted on detaining it until the balance of the account was paid, he could not afterward, on trial, set up the particular lien to defeat the plaintiff's suit. If, however, he had specifically mentioned the amount for which the lien was, and asserted his right to detain for that amount, and for the general balance of the account, the plaintiff would have been required to tender the amount of the particular lien before he could sustain replevin.⁴ Neither can a bailee of goods base his refusal to deliver on demand or his

¹ *Newman v. Bennett*, 23 Ill. 428; *Smith v. Williamson*, 1 Har. & J. (Md.) 147.

² *Cass v. N. Y. & N. H. R. R.*, 1 E. D. Smith, 522.

³ *St. John v. O'Connell*, 7 Porter, (Ala.) 466; *Zachary v. Pace*, 4 Eng. (Ark.) 212; *Connah v. Hale*, 23 Wend. 463; *Solomons v. Dawes*, 1 Esp. 83; *Jacoby v. Laussatt*, 6 Serg. & R. 300; *Watt v. Potter*, 2 Mason, 77-81.

⁴ *Thatcher v. Harlan*, 2 Houst. (Del.) 194; *Thompson v. Trail*, 6 B. & C. 36; *White v. Gainer*, 2 Bing. 23; *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 304.

desire to consult his bailor, and then at the trial set up a lien for storage.¹ The law, in such case, requires the defendant to act in good faith, and to put his refusal on the true ground, which he will rely upon at the trial.² He cannot make one excuse when the demand is made, and then, when suit is brought, defend on another and different ground. The defendant, in answer to a demand, cannot pretend he has the goods, and induce the plaintiff to sue him, and then resist the suit on the grounds that he did not have them.³ When goods are entrusted to a servant, and he refuses to deliver them to a stranger, because he had no authority to do so, such refusal is not evidence of conversion in an action against the servant. Nor is a demand on the servant sufficient to charge the master, unless he acted under orders. If the servant refuse, and the master afterward approve of the refusal, for the reason that the servant had no authority, it is no evidence of conversion by the master.⁴

§ 382. **The same.** It is proper for the master, when entrusting property to his servant, for which he is responsible to another, to direct that it shall not be delivered to any one, except upon the master's written or personal order, and a demand on the servant, under such circumstances, would avail nothing until he could communicate with and take the order of the master.⁵ When W. and R. hired cows, and W. took them to his farm, some miles from R.'s, and at the end of the time the owner demanded them from R., who said he would have nothing to do with the cows: *Held*, it was for the jury to determine whether, by the reply, he intended to withdraw from a dispute about the property, (and if so, it was no conversion,) or to collude with W. to hinder the owner from recovering his property, which latter would be equivalent to a positive refusal.⁶

¹ *Holbrook v. Wight*, 24 Wend. 169.

² *Isaack v. Clark*, 2 Bulet, 312; *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 304.

³ *Hall v. White*, 3 Car. & P. 136.

⁴ *Mount v. Derick*, 5 Hill, 456; *Mires v. Solebay*, 2 Mod. 242; *Alexander v. Southey*, 5 B. & Ald. 247; *Storm v. Livingston*, 6 John. 44; 4 Inst. 317.

⁵ *Page v. Crosby*, 24 Pick. 215.

⁶ *Mitchell v. Williams*, 4 Hill, 16.

§ 383. **The same.** The defendant rightfully took certain property, and with it a stone. Plaintiff demanded its return. Defendant said he could have it by going to his (defendant's) locker. Plaintiff refused to go, but demanded its return to the place whence it was taken. Defendant refused to comply. *Held*, no conversion.¹

¹ O'Connell v. Jacobs, 115 Mass. 21.

CHAPTER XIV

THE BOND.

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§ 384. **No bond required by the common law.** By the common law no bond was required, the only security being the pledges to prosecute the suit, or answer to the King for false clamor.¹

§ 385. **The English statute.** By statute 11 George II., Ch. 19, § 23, the sheriff was required to take from the plaintiff a bond, with two securities, in double the value of the goods about to be replevied, conditioned to prosecute the suit with effect and without delay, and for a return of the goods if return should be awarded by the court. The sheriff was liable as a trespasser if he served the writ which commanded a delivery of the goods without first taking bond. He was also liable for the sufficiency of the securities,² even up to the time they were

¹ *Ante*, § 26; *Caldwell v. West*, 1 Zab. (21 N. J.) 420.

² *Pearce v. Humphreys*, 14 S. & R. (Pa.) 25; *Oxley v. Cowperthwaite*, 1 Dall. 350; *Myers v. Clark*, 3 W. & S. (Pa.) 539. The sheriff was required to take security at his peril. *Gibbs v. Bull*, 18 Johns. 437.

called upon to make good their obligation. The harshness of this rule has been modified somewhat,¹ and where one of the securities is solvent the fact that others may have been insolvent does not render the officer liable.² The statute also provided that the sheriff might assign the bond to the avowant, or to the person making cognizance, either of whom might bring suit thereon in his own name if the conditions were broken.³ This form of proceeding was the common practice in this country, and still prevails in many of the States. In others the bond is made directly to the defendant. Upon this question the statute of the State where the suit is pending will, of course, govern. The statute 17 Car. 2, Ch. 7, A. D. 1665, provided that when the plaintiff was defeated the avowant should have judgment against the plaintiff for the rent in arrear, in case the value of the cattle distrained amounted to so much, or for an amount equal to the value of the goods. In case the value of the goods did not equal the rent, then for the value of the goods with execution thereon, and the right to distrain again for any further sum due for rent. Prior to the case of *Perreau v. Bevan*, 5 Barn. & Cress. 284, it had been a question as to whether the landlord who elected to proceed under this statute had any remedy upon the bond. Since that case, however, such right has not been seriously questioned. The Statute 11 George II., Ch. 19, A. D. 1738, was held to confer an additional remedy, and to be in aid of the proceeding pointed out in the Statute of 17 Car. 2.⁴

§ 386. **The English statutes the basis of the law concerning bond in this country.** The Statute 11 George II., Ch. 19, is the basis upon which a large proportion of the statutes in this country are framed. Its provisions and the decisions under it have been the foundation which no inconsiderable part of the cases in this country rest.⁵

¹ *Hindle v. Blades*, 5 Taunt. 225.

² *Lord v. Bicknell*, 35 Me. 53.

³ *Acker v. Finn*, 5 Hill, 293; *Knapp v. Colburn*, 4 Wend. 618. See *Waples v. Adkins, Admr., etc.*, 5 Har. (Del.) 381.

⁴ Consult *Perreau v. Bevan*, 5 Barn. & Cress. 284, and the cases there cited.

⁵ *Knapp v. Colburn*, 4 Wend. 618.

§ 387. **Assignment of the bond to defendant.** The usual proceeding, under that statute, and generally under statutes when the bond is to the sheriff, is for the sheriff, (in case the bond is forfeited,) to assign it to the defendant in the replevin suit, who may sue the maker and his security in his own name as assignee. Without the clause authorizing the assignment, the defendant was driven to intricate proceedings against the sheriff, or in the name of the sheriff against the bondsmen.¹ The taking of an assignment of the bond from the sheriff is no waiver of a right to proceed subsequently against him for taking insufficient securities, in case they should prove to be so. A return of *nulla bona* to an execution upon a judgment against the securities in a replevin bond is not conclusive so as to render the sheriff liable. Proof of their solvency or insolvency may be made by the parties and determined as other issues.² A release of the security is equivalent to a release of the sheriff,³ and pending a suit upon the bond the suit against the sheriff is suspended.⁴

§ 388. **The bond a prerequisite.** The proper execution of the bond in this action is a statutory prerequisite to the delivery of the property upon the writ.⁵ This was the rule not only under the English law, but governs in States where the rules of the English law prevail. The officer cannot deliver the property without first taking bond. The command of the writ, as usually framed, is conditional, viz.: "If the plaintiff shall give you security," etc. The prior execution of the bond is as essential as the affidavit; without it, the writ will be quashed, and the judgment will order a return of the goods to the defendant with damages for the wrongful taking.⁶

¹ Gould v. Warner, 3 Wend. 60.

² Myers v. Clark, 3 W. & S. (Pa.) 539.

³ *Ib.*

⁴ Commonwealth v. Rees, 3 Whart. (Pa.) 124; Myers v. Clark, 3 W. & S. (Pa.) 539; Hallett v. Mountstephen, 2 Dowl. & Ryl. 343.

⁵ Pool v. Loomis, 5 Ark. 110. Bond precedes the execution of the writ. Luther v. Arnold, 7 Rich. (S. C.) 397. Whitney v. Jenkinson, 3 Wis. 407; Smith v. McFall, 18 Wend. 521; Milliken v. Selye, 6 Hill, 623.

⁶ Bond must be furnished before writ can be served. Kendall v. Fitts, 2 Fost. (N. H.) 8; Greeley v. Currier, 39 Me. 518; Thomas v. Spofford, 46 Me.

§ 389. **Permission to prosecute as a pauper does not excuse giving bond.** The action cannot be prosecuted *in forma pauperis*; that is, the taking of the pauper's oath will not do away with the necessity of the bond. Plaintiff may obtain the services of the officers without cost by taking the necessary oath and obtaining permission of the court, but this will not entitle him to a seizure of the goods, nor justify the officer in making such seizure, without bond.¹

§ 390. **Wealth of the plaintiff no excuse.** Neither will the fact that the plaintiff is a man of abundant means furnish an excuse for not taking the formal bond, with securities required by the statute;² nor will a deposit of money answer in place of the bond.³ The statutory bond being in all cases indispensable before the delivery of the property by the officer, he is guilty of trespass if he make the delivery without it,⁴ and the defendant may at once bring suit against the officer, or may elect to abide the result of the replevin suit, as he chooses.⁵

§ 391. **Delivery cannot be made without bond given.** The officer may commence to execute the writ before taking bond;

408. Sheriff liable in case he fails to take bond as required by this statute. *State v. Stephens*, 14 Ark. 266; *State v. Boisliniere*, 40 Mo. 568; *Harriman v. Wilkins*, 20 Me. 96; *Kesler v. Haynes*, 6 Wend. 547; *Nunn v. Goodlett*, 5 Eng. (Ark.) 100. "Bond for cost is not sufficient; it must be in compliance with the statute, or the suit will be dismissed." *Creamer v. Ford*, 1 Heisk. (Tenn.) 307. "Failing to give bond works a discontinuance." *Weathersby v. Sleeper*, 42 Miss. 738; *Deardorff v. Ulmer*, 34 Ind. 353; *Graves v. Sittig*, 5 Wis. 219. And the judgment is for a return, and damages follow. *Morris v. Baker*, 5 Wis. 389; *Parker v. Hall*, 55 Me. 364. "The bond is as essential as the affidavit." *Smith v. McFall*, 18 Wend. 521; *Wilson v. Williams*, 18 Wend. 581; *Whaling v. Shales*, 20 Wend. 673; *Morris v. Van Voast*, 19 Wend. 283; *Graves v. Sittig*, 5 Wis. 219. If the sheriff has taken the property without first taking bond with proper security, he ought at once to return it to the defendant. *State v. Stephens*, 14 Ark. 264; *Pirani v. Barden, Pike*, (5 Ark.) 81.

¹ *Horton v. Vowel*, 4 Hcisk. (Tenn.) 622.

² *Smith v. Trawl*, 1 Root, (Conn.) 165; *Harriman v. Wilkins*, 20 Me. 96.

³ *Cummings v. Gann*, 52 Pa. St. 488.

⁴ *Dearborn v. Kelley*, 3 Allen, (Mass.) 426; *Armstrong v. Burrell*, 12 Wend. 303.

⁵ *Whitney v. Jenkinson*, 3 Wis. 408; *O'Grady v. Keyes*, 1 Allen, (Mass.) 284.

that is, where the statute requires an appraisal, he may have the goods appraised, and for that purpose may take the property, if necessary, from the defendant;¹ but he cannot lawfully deliver it to the plaintiff until he shall first have taken bond as the law provides. When the goods are so taken for appraisal, unless the plaintiff promptly executes the bond demanded, the sheriff ought to return them.² From the cases cited, it is clear that when the sheriff serves the writ by delivering the property without first taking bond, or where the bond taken is defective under the statute, the defendant may abate the writ on motion, and compel a return of the goods, or he may regard the taker as a trespasser and recover damages as in other cases of trespass to personal property; but he cannot have trespass with the other actions for the value or for the goods.³

§ 392. **The bond must conform to the statute.** The bond must conform to the statutory requirements in all essential particulars. It must be in double the value of the property about to be replevied, but if it be in excess of that amount that fact will not render it defective.⁴ Defects in the form of the bond may be taken advantage of by plea in abatement or by motion to dismiss,⁵ or the defendant may, if he prefer such course, obtain a rule of court upon the plaintiff, requiring him to furnish a bond in proper form. Defects in the bond should be taken advantage of in the first instance, and such objection comes too late after verdict and judgment.⁶ In case the sheriff take bond in an insufficient amount, the

¹ *Smith v. Whiting*, 97 Mass. 316; *Wolcott v. Mead*, 12 Met. (Mass.) 516.

² *State v. Stephens*, 14 Ark. 264. The statute of Wisconsin allows the officer to take the property and hold it a reasonable time to permit the plaintiff to give bond. *Graves v. Sittig*, 5 Wis. 219. But unless there are statutory exceptions, the officer cannot serve the writ until the bond is furnished.

³ *Parker v. Hall*, 55 Me. 364; *Cady v. Eggleston*, 11 Mass. 285.

⁴ *Owen v. Nail*, 6 T. R. 702 and 339; *Clap v. Guild*, 8 Mass. 154; *Freeman v. Davis*, 7 Mass. 200; *Bugle v. Myers*, 59 Ind. 73; *Whitney v. Jenkinson*, 3 Wis. 407; *Smith v. McFall*, 18 Wend. 521.

⁵ *Houghton v. Ware*, 113 Mass. 49; *Hicks v. Stull*, 11 B. Mon. 53; *Douglas v. Gardner*, 63 Me. 462.

⁶ *Bugle v. Myers*, 59 Ind. 73.

defendant may object and move to dismiss the suit, or he may have an action against the sheriff for his neglect.¹

§ 393. **The bond not necessary to the trial.** The bond, when in form and sufficient, is not necessary to the trial; the case proceeds without reference to it. It is only after judgment, and a failure on the part of the plaintiff to keep the conditions, that resort can be had to it.² Its absence, therefore, at the trial, would in no way affect the jurisdiction or proceeding of the court.³ The neglect of the sheriff to take bond is not a contempt of court for which an attachment will be issued.⁴

§ 394. **Where the sheriff is a party.** Where the sheriff is interested in the replevin suit, the writ is directed to the coroner, who must take the bond. The statute means that the bond shall be taken by the officer who executes the writ.⁵ So a bond to the deputy sheriff who signed the return, when he as such deputy assigned the bond to the party, was held sufficient under a statute which required the bond to run to the officer serving the writ, designating him as "such officer."⁶

§ 395. **Defendant may give bond and retain the property.** In many of the States, provisions exist by statute, which allow the defendant claiming the property, a reasonable time within which to give bond to the plaintiff, and by so doing he has the right to retain possession of the goods pending the suit. In such case no liability attaches to the makers of the plaintiff's bond.

§ 396. **Bond not necessary where the plaintiff does not ask delivery.** Statutes also exist in many States, by which the plaintiff may have the writ without the command to deliver the goods. In such case the property remains in the defendant's possession during the suit, and a delivery to plaintiff

¹ *Deardorff v. Ulmer*, 34 Ind. 353; *O'Grady v. Keyes*, 1 Allen, (Mass.) 284. So, when a deputy sheriff, acting for his superior, take insufficient security, the sheriff is responsible. *Harriman v. Wilkins*, 20 Me. 96.

² *Tuck v. Moses*, 58 Me. 463; *Pirani v. Barden*, 5 Ark. 81.

³ *Tripp v. Howe*, 45 Vt. 524; *Kesler v. Haynes*, 6 Wend. (N. Y.) 547.

⁴ *Rex v. Lewis*, 2 Term. R. 617; *Twells v. Coldville*, Willes, 375.

⁵ *Speer v. Skinner*, 35 Ill. 284.

⁶ *Whceler v. Wilkins*, 19 Mich. 80.

only follows a judgment of the court in his favor; consequently, in such case no bond is required.

§ 397. **Description of the bond.** The bond, in modern practice, is an obligation for the payment of the sum named therein, upon certain conditions. The principal conditions are, that the plaintiff shall prosecute his suit with effect and without delay, or in case of failure to do so, shall make return of the goods, (if return be awarded,) and shall pay such damages as shall be awarded in case of failure to do so—in some States a condition is inserted that the party shall save and keep harmless the sheriff, in making the replevin—with a proviso that if the conditions are kept and fulfilled, the obligation shall be void.

§ 398. **Objects and purposes of the bond.** Originally the bond was designed to furnish indemnity to the sheriff in taking the goods from the defendant.¹ In modern practice the bond is not only to indemnify the officer, but it is looked upon as furnishing additional security to the defendant as well, in case the action is not sustained;² the object of the bond being to compel the plaintiff to prosecute his suit with effect and without delay, and in case of failure to return the goods, if return be awarded;³ or, to furnish the defendant with a sufficient indemnity in case its conditions are not complied with.⁴

§ 399. **The return of the bond with the writ.** The sheriff is required to return the bond with the writ, so that the defendant may inspect it, and object to its form or sufficiency, or to the solvency of the securities. In some States this is a statutory provision, in others a rule of practice.⁵ Upon the return of the bond to the court, the defendant may file excep-

¹ *Armstrong v. Burrell*, 12 Wend. 302; *Gordon v. Williamson*, 1 Spence, (20 N. J.) 81; *Barry v. Sinclair*, Phill. (N. C.) 7.

² *Langdoc v. Parkinson*, 2 Bradw. (Ill.) 138; *Petrie v. Fisher*, 43 Ill. 443; *Fahnestock v. Gilham*, 77 Ill. 637; *Nunn v. Goodlett*, 5 Eng. (Ark.) 100; *Smith v. Whiting*, 97 Mass. 316; *Doogan v. Tyson*, 6 Gill. & J. (Md.) 453.

³ *Badlam v. Tucker*, 1 Pick. 287.

⁴ *Belt v. Worthington*, 3 Gill. & J. (Md.) 247; *Doogan v. Tyson*, 6 Gill. & J. (Md.) 453.

⁵ *Petrie v. Fisher*, 43 Ill. 443; *Nunn v. Goodlett*, 5 Eng. (Ark.) 100.

tions to its form, or to the sufficiency of the securities. In case the exceptions are sustained, plaintiff may be required to furnish a good bond, and if he neglect to do so, his suit may be dismissed and a return of the property awarded.¹

§ 400. **Amount of penalty in the bond** The mode of ascertaining the value of the property as a basis for fixing the penalty to be inserted in the bond, varies in different States. By the English law the sheriff was required to take bond in double the value of the property, and also to see that the bond was sufficient not only in respect to the solvency of the security, but in the amount for which it was taken. In States where the law does not require an appraisalment, the practice has become general to accept the statement in the affidavit as the value of the property; and the officer is usually governed by it. In some States this is a statutory provision,² in others a rule adopted by general consent. The sheriff, however, unless the statute requires it, is not bound by the value stated in the affidavit. Where there is no statutory method provided for fixing that value, as by appraisalment or otherwise, it is his duty to see that the penalty in the bond is large enough, up to double the value, to fully indemnify him in making the replevin, and to protect the defendant from loss.³ In other States the statute requires that the property shall be appraised by disinterested parties, who fix the value after an inspection. In such case the amount of the bond is based upon the amount of such appraisalment.⁴ The parties may agree and so fix the value, and that will be sufficient and binding on both.⁵

§ 401. **Sheriff may take the property for purpose of appraisalment.** Although the officer has no right to deliver the property to plaintiff until the bond is executed and delivered to

¹ *Allen v. Judson*, 71 N. Y. 77.

² *Deardorff v. Ulmer*, 34 Ind. 353. See *Pomeroy v. Timper*, 8 Allen, 401.

³ *Murdoch v. Will*, 1 Dall. 341; *Kimball v. True*, 34 Me. 88; *Plunket v. Moore*, 4 Har. (Del.) 379; *Jeffery v. Bastard*, 4 Adol. & E. 823; *Roach v. Moulton*, 1 Chand. (Wis.) 187; *Thomas v. Spofford*, 46 Me. 408; *Gibbs v. Bull*, 18 Johns. 435; *Harriman v. Wilkins*, 20 Me. 93; *People, etc. v. Core*, 85 Ill. 248.

⁴ Look at *Aulick v. Adams*, 12 B. Mon. 104.

⁵ *Wolcott v. Mead*, 12 Met. 516.

him, yet, for the purposes of appraisalment, he may take the property into his possession,¹ and upon that being done, if the bond is not promptly forthcoming, the sheriff must return the goods to the defendant.²

§ 402. **Sheriff not required to prepare bond; duty of the party.** The duty imposed upon the sheriff to take the bond does not require him to demand it from the plaintiff nor to prepare it to be executed. The obligation to "take bond," means that he must, when a sufficient bond is tendered him by the plaintiff or his attorney, accept it and execute the writ.³ A delivery of the bond properly executed, to the sheriff, is a sufficient delivery for all purposes.⁴

§ 403. **To whom payable.** The common law required the sheriff to take the bond to himself. In many of the States, however, it is by statute to be made to the defendant. When the statute requires it to the defendant, the officer is a trespasser if he take the goods upon a bond to himself, and the instrument is void.⁵ The statutory provisions upon this question must therefore be closely followed.

§ 404. **Though defective as a statutory bond, it may be good at common law.** While the bond may be faulty under the statute, and insufficient to sustain the plaintiff's suit if objections are properly interposed, yet, when the plaintiff has had the goods delivered to him, and he is defeated, and for any reason the judgment is against him, the fact that the bond does not conform to the statute is no defense to a suit thereon. It may be entirely inadequate as a statutory bond to sustain replevin on, but may, nevertheless, be good as a common law bond,⁶ and

¹ *Smith v. Whiting*, 97 Mass. 316.

² *State v. Stephens*, 14 Ark. 264; *Smith v. Whiting*, 97 Mass. 316; *Wolcott v. Mead*, 12 Met. (Mass.) 516.

³ *State v. Stephens*, 14 Ark. 266.

⁴ *Smith v. Whiting*, 97 Mass. 317.

⁵ *Purple v. Purple*, 5 Pick. 226.

⁶ *Claggett v. Richards*, 45 N. H. 360; *Tuck v. Moses*, 54 Me. 115; *Persse v. Watrous*, 30 Conn. 140; *Bell v. Thomas*, 8 Ala. 527; *Barry v. Sinclair*, Phill. (N. C.) 7; *Florrance v. Goodin*, 5 B. Mon. (Ky.) 111; *Lambden v. Conoway*, 5 Har. (Del.) 1.

as such, must receive such construction as will most effectually accomplish the intent of the parties to it.¹

§ 405. **The same. Construction.** In *Morse v. Hodsdon*, 5 Mass. 318, PARSONS, J., said: "The condition of the bond was variant from the statute, but the statute does not prohibit the taking of bond in any other form, or declare such bond void. The plaintiff, under color of the bond given, has obtained possession of the goods; and it would be unreasonable to allow the makers of the bond to dispute it, after their principal has had the benefit of it." And the rule may be regarded as general, that a bond, though irregular under the statutes, is not for that reason void. The party may treat it as a voluntary bond, and recover upon it, provided its terms are sufficient to sustain his claim;² and unless it so widely departs from the requirements of the statute as to defeat the objects, it may still be sufficient to support an action against its makers.³ Whether a bond, good as a common law bond, but defective as a statutory replevin bond, is assignable, under a statute which makes the statutory bond assignable, may be doubted. The party, in seeking to recover upon it, would doubtless be required to conform his proceeding to his common law rights.⁴

§ 406. **By whom it must be executed.** The bond may be executed by the plaintiff in person, or by some one for him, who is duly authorized to sign his name to such an undertaking.⁵

§ 407. **Bond may be executed by a stranger to the suit.** Or it may sometimes be executed by a stranger to the suit, with proper securities in behalf of the plaintiff. In some of the States the statutes provide that the plaintiff, or some one

¹ *Tuck v. Moses*, 58 Me. 472; *Livingston v. Superior Ct. N. Y.*, 10 Wend. 547.

² *Branch v. Branch*, 6 Fla. 315; *Stansfeld v. Hellawell*, 11 E. L. & Eq. 559; *Claggett v. Richards*, 45 N. H. 360.

³ *Stevenson v. Miller*, 2 Litt. Rep. (Ky.) 307; *Cobb v. Curts*, 4 Litt. Rep. 235; *Fant v. Wilson*, 3 Mon. (Ky.) 342; *Hoy v. Rogers*, 4 Mon. (Ky.) 225; *Roman v. Stratton*, 2 Bibb. (Ky.) 199; *Nunn v. Goodlett*, 5 Eng. (Ark.) 100; *Fahnestock v. Gilham*, 77 Ill. 637; *Jennison v. Haire*, 29 Mich. 209.

⁴ *Austen v. Howard*, 7 Taunt. 327.

⁵ *Howe v. Handley*, 28 Me. 241; *Greeley v. Currier*, 39 Me. 516; *Garlin v. Strickland*, 27 Me. 443.

in his behalf, shall execute the bond. Under this provision, it is not essential that the plaintiff should appear as a party to it in any way. A bond, in other respects formal and sufficient, made by his agent or friend, or even by a stranger, in his behalf, would be a compliance with such a statute.¹ When the statutes, however, require the plaintiff to execute the bond, it will be insufficient, unless made by him either personally or by his attorney duly authorized.

§ 408. **How executed.** It must be executed under seal. An instrument not under seal cannot be a valid replevin bond.² The securities may be released, and others substituted, by leave of the court; but the party giving the bond cannot, by a deposit of money, release the securities.³

§ 409. **When it may be amended.** The court may allow amendment to the bond in such particulars as are amendable. When it was not in double the amount, the court permitted a new bond to be filed.⁴ When the statute required two securities, and the bond was signed by but one, the court permitted another bond, with proper security to be given.⁵ So, when it appears necessary to use one of the securities as a witness, the court may permit a new bond, with other securities, to be substituted.⁶ When the securities are insolvent at the time of the commencement of the suit, the court may make order requiring good security to be furnished, and may hold the defendant in custody until he shall have complied with the order.⁷ A bond executed on Sunday is void,⁸ under a statute which pro-

¹ Consult *Branch v. Branch*, 6 Fla. 315; *Stats. of Ill.*, Title Replevin, § 10. See *Frei v. Vogel*, 40 Mo. 149; *Statute of Michigan*, § 504; *Claffin v. Thayer*, 13 Gray, (Mass.) 459; *Kinney v. Mallory*, 3 Ala. 626.

² *Lovejoy v. Bright*, 8 Blackf. (Ind.) 206. This has been changed by statute in many of the States. See *Handley v. Hathaway*, 4 T. B. Mon. (Ky.) 554.

³ *Cummings v. Gann*, 52 Pa. St. 484.

⁴ Where the appraisement was \$320.20, and the sheriff made oath the 20 cents was a mistake, and the bond was in double \$320, an amendment of the recital was in order. *Hammond v. Eaton*, 15 Gray, (Mass.) 186.

⁵ *Whaling v. Shales*, 20 Wend. 673; *Smith v. McFall*, 18 Wend. 523; *Hawley v. Bates*, 19 Wend. 632; *Smith v. Howard*, 23 Ark. 203.

⁶ *Kendall v. Pitts*, 2 Fost. (N. H.) 9.

⁷ *Cash v. Quenichctt*, 5 Heisk. (Tenn.) 738.

⁸ *Link v. Clemmens*, 7 Blackf. 480.

hibits common labor. But where the statute required the execution of a bond within twenty-four hours, and the replevin was on Saturday, Sunday was not included in the estimate of time.¹ One partner cannot bind his co-partner by signing and sealing bond in partnership name.²

§ 410. **Defect in the bond — when and how taken advantage of.** As has been shown, the officer executing a writ of replevin must see that the bond is properly executed and delivered, as required by the statute, or he will be liable as a trespasser;³ but the failure of the sheriff to take bond, or the acceptance of an informal or insufficient one, must be taken advantage of by the defendant at the earliest practicable opportunity,⁴ as such defective bond will not deprive the court of jurisdiction, nor in any way interfere with or avoid the proceeding;⁵ and by omitting to take advantage of such defect, and by pleading to the merits, the defendant will be presumed to have waived his objection, and will not usually be permitted to assert and take advantage of them afterwards.⁶ When the bond did not name the security in the body of it, and being "I" promise to pay, signed by the principal and security, it was held valid as against the signers.⁷

§ 411. **Requisites of the bond.** The bond should correctly describe the suit in which it is given; it should name the parties, especially is it important to correctly name the defendant from whom the goods are to be taken; otherwise it cannot be told for whose benefit the bond is given. An omission in this

¹ *Link v. Clemmens*, 7 Blackf. 480.

² *Butterfield v. Hemsley*, 12 Gray, 226. Compare *Judson v. Adams*, 8 Cush. 556.

³ *Dearborn v. Kelley*, 3 Allen, (Mass.) 426; *Nunn v. Goodlett*, 5 Eng. (Ark.) 89; *Parker v. Hall*, 55 Me. 363.

⁴ *Houghton v. Ware*, 113 Mass. 49.

⁵ *Tuck v. Moses*, 58 Me. 473; *Tripp v. Howe*, 45 Vt. 524.

⁶ *Tripp v. Howe*, 45 Vt. 524; *Spencer v. Dickerson*, 15 Ind. 368. Where bond was with a single security, and an objection to it therefore would have been valid if made in apt time, yet, being allowed to run to a subsequent term, it was too late. *Clafin v. Thayer*, 13 Gray, 459; *Simonds v. Parker*, 1 Met. 508. It is too late after a verdict. *Rich v. Ryder*, 105 Mass. 308.

⁷ *Clarke v. Bell*, 2 Litt. (Ky.) 164.

respect is fatal, and the bond void.¹ It ought also to state the court in which the suit is brought, and the date or term at which the suit is begun; but error in this respect is not fatal when the suit and property are so described that they can readily be identified.² Where the condition was to appear at the next term of the county court, and it was objected that there was no such court, it was held that the objection was too technical, and the words were held to mean court of common pleas.³

§ 412. **The same.** It ought also to describe the goods to be replevied, and to state their value. An omission in this last respect may not be serious, but a failure to describe the goods would lead to great embarrassments, and probably render the bond objectionable.⁴ It must be for a definite sum, stated in dollars or some denomination of money; a bond in "double the value of the goods about to be replevied" is not sufficient.⁵ The value may be agreed upon by the parties, and such agreement returned by the officer.⁶

§ 413. **The conditions separate and independent of each other.** The bond is for the payment of the penalty mentioned therein upon conditions which have already been stated. Each of these conditions is a separate obligation, distinct from all the others, and for a failure to keep any one of them, an action may be sustained for the full penalty of the bond, even though the obligors should keep all the others.⁷ The rule is also well settled that where the conditions of the bond are severable, part may be void, while the remainder may be valid. If the valid and void portions were incapable of severance, the

¹ *Arter v. The People*, 54 Ill. 228; *Matthews v. Storms*, 72 Ill. 321.

² *Branch v. Branch*, 6 Fla. 315; *Graves v. Shoefelt*, 60 Ill. 464; *Chadwick v. Badger*, 9 N. H. 450.

³ *Arnold v. Allen*, 8 Mass. 147.

⁴ *McDermott v. Doyle*, 11 Mo. 443. *Contra*, *Branch v. Branch*, 6 Fla. 315.

⁵ *Bennett v. Allen*, 30 Vt. 684; *Case v. Pettee*, 5 Gray, 27; *Clark v. Conn. Riv. R. R.*, 6 Gray, 363.

⁶ *Wolcott v. Mead*, 12 Met. 516.

⁷ *Perrean v. Bevan*, 5 B. & C. (11 E. C. L.) 284; *Brown v. Parker*, 5 Blackf. 292; *Sopris v. Lilley*, 2 Colorado, 498; *Clark v. Norton*, 6 Minn. 417; *Hall v. Smith*, 10 Iowa, 47; *Fullerton v. Miller*, 22 Md. 5; *Persse v. Watrous*, 30 Conn. 146; *Pettygrove v. Hoyt*, 2 Fairfield, (Me.) 66; *Lambden v. Conoway*, 5 Har. (Del.) 1.

bond would be wholly void. But when the conditions are distinct, the obligor is not so injured by what is merely void that he can make use of it to protect him against what is valid.¹

§ 414. **The condition to prosecute without delay.** If the plaintiff delay to prosecute his suit for any unusual or unreasonable time, without the defendant's consent, the condition to prosecute without delay will be broken.² Thus, a failure to prosecute for two years, without good cause shown, was regarded as a forfeiture of this condition, though no judgment of *nol pros.* was entered.³ But when the breach assigned was for a failure to prosecute with effect, a plea that the suit was still pending was good, as the condition to prosecute with effect is not broken by delay, however prolonged. The breach should in such case be upon the condition to prosecute without delay.⁴

§ 415. **To prosecute with effect.** The condition to prosecute with effect is separate and absolute, and requires the plaintiff to prosecute the suit to a successful issue.⁵ And if, for any cause, the plaintiff fails in his suit, or suffers a non-suit, or

¹Newman v. Newman, 4 Maul. & Selw. 70. This question is considered in United States v. Brown, Gilpin C. C. 155. See Vroom v. Exrs. of Smith, 2 Gr. (14 N. J. L.) 480; Anderson v. Foster, 2 Bailey, (S. C.) 501; Erlinger v. The People, 36 Ill. 458; Balsley v. Hoffman, 13 Pa. St. 607. "The conditions of the bond are disjunctive. Each depends only on itself, and the breach of any one of the separate conditions occasions a forfeiture of the penalty, notwithstanding all the others may have been kept." Berghoff v. Heckwolf, 26 Mo 513; Persse v. Watrous, 30 Conn. 146; Kimmel v. Kint, 2 Watts, (Pa.) 432; Humphrey v. Taggart, 38 Ill. 228; Gibbs v. Bartlett, 2 W. & S. (Pa.) 33. "Where one of the conditions is void, it does not affect the others." Chaffee v. Sangston, 10 Watts, (Pa.) 266. This has been the rule ever since the bond has been used in replevin. Pigot's Case, 11 Co. Rep. 27; Vaughn v. Norris, Ca. t. H. 139; Turnor v. Turner, 2 Brod. & Bing. 112; Harrison v. Wardle, 5 Barn. & Adolph, 146; Badlam v. Tucker, 1 Pick. 286; Brown v. Parker, 5 Blackf. (Ind.) 292. See Dugan v. England, Harper, (S. C.) 214.

²Daniels v. Patterson, 3 Comst. (N. Y.) 51.

³Axford v. Perrett, 4 Bing. 586. See Moore v. Bowmaker, 7 Taunt. 97.

⁴Brackenbury v. Pell, 12 East. 586; Harrison v. Wardle, 5 B. & Adolph, 146.

⁵Persse v. Watrous, 30 Conn. 144; Tummons v. Ogle, 37 E. L. & Eq. 15; Humphrey v. Taggart, 38 Ill. 228; Balsley v. Hoffman, 13 Pa. St. 603.

judgment, or verdict, against him, it is a breach of this condition for which an action may be sustained for the full penalty of the bond.¹ If the action be dismissed, even with the consent of the defendant, it is a clear failure to prosecute with effect;² but consent of the defendant to waive any of his rights to damages, or to return, would change the case.³ So when the defendant pleaded *non cepit*, and the plaintiff afterward was non-suited, there was no failure to prosecute with success.⁴ Failure to prosecute with effect constitutes a breach of condition of the bond, without judgment for a return,⁵ and such a judgment is not necessary to entitle the defendant to sustain an action for a failure to keep this condition.⁶

§ 416. **The same. What is prosecution with effect.** Where the defendant pleads *non cepit* only, and succeeds upon the issue that he did not take the goods, such a verdict in his favor does not constitute a breach of the condition of the plaintiff's bond to prosecute with effect. Instead of entitling him to a judgment for a return, such a result only ratifies his renunciation of the property.⁷ The statutory form of the bond under discussion differed slightly from the ordinary replevin bond, the conditions of the former being, "that in case the plaintiff failed to make good his claim to the property," etc. The court says, "the primary condition of the bond, that which is the basis of liability on it, is, that in case the plaintiff shall fail to make good his claim to the property, he will re-deliver the goods. Whatever absolves him from this condition discharges him from every liability on his bond." Success by the defend-

¹ M'Farland v. McNitt, 10 Wend. 330; Langdoe v. Parkinson, 2 Bradw. (Ill.) 136; Morgan v. Griffiths, 7 Mod. 380; Turner v. Turner, 2 Brod. & Bing. 107; Perreau v. Bevan, 5 B. & C. 284; Phillip v. Pierce, 3 Maul. & Selw. 182; Gould v. Warner, 3 Wend. 54; Dias v. Freeman, 5 T. R. 195 and 104; Humphrey v. Taggart, 38 Ill. 228; Doogan v. Tyson, 6 Gill. & J. (Md.) 453; Hansard v. Reed, 29 Mo. 473; Berghoff v. Heckwolf, 26 Mo. 511.

² Stevison v. Earnest, 80 Ill. 513.

³ Hall v. Smith, 10 Iowa, 46.

⁴ Cooper v. Brown, 7 Dana, (Ky.) 333.

⁵ Elliott v. Black, 45 Mo. 373; Brown v. Parker, 5 Blackf. (Ind.) 292; Dias v. Freeman, 5 Term. R. 195 and 104.

⁶ Sopris v. Lilley, 2 Colorado, 498.

⁷ Ladd v. Prentice, 14 Conn. 116.

ant on the simple issue of *non cepit*, instead of a breach of the bond, is an effectual defense against all his claims under it.¹

§ 417. **Prosecution in inferior court not sufficient when the case is appealed.** Prosecution with effect in the inferior court does not satisfy this condition when the suit is removed to a superior court. The plaintiff is bound to follow and prosecute it to a successful issue. This was the common law in cases where the action was removed by a writ of *recordari*, or by *pone*,² and is the rule in this country when the removal is by appeal from an inferior to a superior court.³ Where the parties stipulated that the replevin suit should be dismissed, and that the plaintiff should pay the defendant, who was the plaintiff's landlord, a certain sum, and that each should pay his own cost, this stipulation was held sufficient evidence of a failure to prosecute with effect.⁴

§ 418. **Death of party pending suit.** But if the plaintiff die pending suit the condition to prosecute with effect is not broken, the reason assigned being that the death of the party renders the prosecution of the replevin suit impossible, and the performance of the condition rendered impossible by the act of God.⁵ So when the plaintiff prosecutes his suit until abated by the death of the defendant, it will be regarded as a compliance with the conditions to prosecute with effect.⁶

§ 419. **The condition to return.** The condition to return the goods, if return be awarded, is one of the principal — perhaps the principal — condition of the bond. The obligation imposed upon the makers of the bond by this condition is an active, not a passive duty. It requires a return of the goods.

¹ See, also, *Persse v. Watrouse*, 30 Conn. 147.

² *Lane v. Foulk*, Comb. 228; *Gwillim v. Holbrook*, 1 Bos. & Pul. 410; *Vaughn v. Norris*, c. t. H. 137; *Blacket v. Cressop*, 1 Lutw. 688; *Butcher v. Porter*, 1 Show. 400.

³ *Balsley v. Hoffman*, 13 Pa. St. 603; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 34.

⁴ *Hallett v. Mountstephen*, 2 Dow. & Ry. 343.

⁵ *Persse v. Watrous*, 30 Conn. 147; *Green v. Barker*, 14 Conn. 431; *Parsons v. Williams*, 9 Conn. 236; *Burkle v. Luce*, 1 Comst. (N. Y.) 163; *Burkle v. Luce*, 6 Hill, (N. Y.) 558; *Morris v. Mathews*, 2 Ad. & El. (N. s.) 297.

⁶ *Badlam v. Tucker*, 1 Pick. 284. Such was the law in England. *Ormand v. Brierly*, Carth. 519; *Bacon Ab.* title Replevin, D.

The object is to secure a prompt restoration to the defendant of the goods which have been taken from him upon the writ. It is not simply a condition to surrender the goods to an officer upon a writ of return, or that the property may be extorted from the makers of the bond on such process. To a suit for a failure to keep this condition it is no defense to say that the sheriff did not take the property when he could.¹ A judgment for a return not complied with is a breach of this condition;² but where the condition is to make return if return be awarded the obligors are not guilty of a breach of this condition unless there be a judgment for a return.³ The condition to make return is performed if the plaintiff in replevin restore the goods seasonably after the return is awarded;⁴ or if the goods are taken on a writ of return by the officer, it is a compliance with the condition.⁵ To an action on a bond the defendant pleaded that one of the defendants forcibly took the possession from him. *Held*, no defense, though it might be permitted to go in, in mitigation of damages.⁶

§ 420. **Offer to return unaccompanied by a tender not a performance.** An offer to return unaccompanied by any tender of the goods is not a performance of this condition. When the defendant in a suit on a bond attempted to show that he offered to return the goods to the sheriff, and that the latter refused to accept them because he had been directed not to do so by the attorney; *held*, no proof of a tender, and no defense to suit on the bond.⁷ It would seem from this case that an actual tender of the goods was necessary to performance of the condition to return.

¹ *Jennison v. Haire*, 29 Mich. 209; *Burkle v. Luce*, 6 Hill, 558; *Peck v. Wilson*, 22 Ill. 206. See *Carrico v. Taylor*, 3 Dana, (Ky.) 33; *Cooper v. Brown*, 7 Dana, (Ky.) 333; *Cooper v. Peck*, 22 Ala. 406; *Cushenden v. Harman*, 2 Tyler, (Vt.) 431.

² *Smith v. Pries*, 21 Ill. 656; *Davis v. Harding*, 3 Allen, 302. Compare *Cowdin v. Stanton*, 12 Wend. 120.

³ *Clark v. Norton*, 6 Minn. 415; *Ladd v. Prentice*, 14 Conn. 117.

⁴ *Sopris v. Lilley*, 2 Col. 498. See *Way v. Barnard*, 36 Vt. 370; *Walbridge v. Shaw*, 7 Cush. 560; *Cook v. Lothrop*, 18 Me. 260.

⁵ *Carrico v. Taylor*, 3 Dana (Ky.) 33; *Harrod v. Hill*, 2 Ib. 165.

⁶ *Story v. O'Dea*, 23 Ind. 326.

⁷ *Schrader v. Wolfen*, 21 Ind. 238.

§ 421. The condition to return requires the return of the identical goods. This condition also requires the return of the identical goods taken; the substitution of other goods of like description and value is not a compliance with the bond.

§ 422. And in as good order as when taken. It is also an implied obligation that the goods shall be in as good order and condition as when taken. When an express provision of the statute to this effect was omitted in a revision by the legislature, it was not regarded as changing the law.¹ But if the property has in fact been injured while in the plaintiff's possession, that fact will not absolve the defendant from the duty of receiving it in its damaged condition. The judgment for a return does not leave it at the option of the defendant to accept or refuse and demand the value. The depreciation is, however, to be made good, and the party may receive full indemnity by suit on the bond.²

§ 423. Judgment for a return a breach of the condition. Judgment for a return having been given, a failure of the plaintiff to make it is a breach of the condition, and suit may be brought at once, without demand.³ Neither is it necessary, in the absence of statutory requirement, to have a writ of return before suit on the bond. It is sufficient that the return was adjudged and not made.⁴

§ 424. The bond only relates to claims in the suit in which it is given. The bond is only for the indemnity of the party for damages occasioned by the replevin suit. A suit in replevin was begun and dismissed. The defendant then brought replevin for the property, and recovered judgment and damages

¹ *Parker v. Simonds*, 8 Met. 211; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 34.

² *Allen v. Fox*, 51 N. Y. 562. But see *Douglass v. Douglass*, 21 Wall. 98.

³ *Wright v. Quirk*, 105 Mass. 45; *Cook v. Lothrop*, 18 Me. 260; *Parker v. Simonds*, 8 Met. 205; *Persse v. Watrous*, 30 Conn. 148.

⁴ *Peck v. Wilson*, 22 Ill. 206. Plaintiff may prove it. *Smith v. Pries*, 21 Ill. 656. See *Robertson v. Davidson*, 14 Minn. 554; *M'Farland v. M'Nitt*, 10 Wend. 330; *Gould v. Warner*, 3 Wend. 54; *Knapp v. Colburn*, 4 Wend. 618; *Hunter v. Sherman*, 2 Scam. 544. *Contra*, suit on the bond for breach of the condition to return cannot be maintained without a writ of return unsatisfied. *Cowden v. Pease*, 10 Wend. 334; *Cowdin v. Stanton*, 12 Wend. 120; *Pemble v. Clifford*, 2 McCord, (S. C.) 31; *Pemble v. Clifford*, 3 McCord, (S. C.) 34; *Shaw v. Tobias*, 3 Comst. 188.

to the amount of \$270. To satisfy these damages, she brought suit on the bond given to her in the original suit. *Held*, the bond was for the special purpose of indemnifying her for such damages as might be adjudged in that suit; not for damages in a subsequent one. The suit in which the bond was given was dismissed, with no judgment in her favor, and upon such claim no recovery could be had.¹

§ 425. **Actual delivery of the goods on the writ precedes liability on the bond.** The law in many States permits the defendant to retain the property, upon giving bond to abide the order of the court. In suit on a bond in such a case the plaintiff must allege and prove a delivery of the property to the plaintiff in replevin. The delivery must precede the liability on the bond.²

§ 426. **Actual return in as good order a compliance with this condition.** An actual return of the goods in proper time and order is a compliance with this condition. So, also, when property is replevied from the sheriff and comes back into his hands by seizure on another execution, and the plaintiff in replevin requests him to hold it on the first. This is equivalent to a return; the condition for a return is fulfilled.³ And there are many cases which recognize the continuing lien of an execution, (when goods seized on execution have been replevied,) in case the plaintiff in the replevin has failed in his suit.⁴

§ 427. **General principles governing the construction of the bond.** The principles which govern in the construction of a replevin bond are similar to those which apply to other bonds. When the terms of the instrument render it possible, the court will always adopt a construction which gives to the bond some effect, rather than one which annuls it.⁵ The court will

¹ *Boyer v. Fowler*, 1 Wash. Ter. 119.

² *Nickerson v. Chatterton*, 7 Cal. 570. See *Clary v. Rolland*, 24 Cal. 147.

³ *Hunt v. Robinson*, 11 Cal. 262.

⁴ *Caldwell v. Gans*, 1 Blake, (Mon.) 581. See *Cook v. Lothrop*, 18 Me. 260; *Burkle v. Luse*, 1 Comst. 163; *Evans v. King*, 7 Mo. 411; *Hagan v. Lucas*, 10 Pet. (U.S.) 400; *Lockwood v. Perry*, 9 Met. 440; *M'Rae v. M'Lean*, 3 Port. (Ala.) 138.

⁵ 2 Bla. Com. 179; *Mitchell v. Ingram*, 38 Ala. 395. So of deeds. Good-

also look to the manifest intention of the parties, and carry it out, if that be possible, from the terms of the instrument.¹ Words used are to receive their ordinary popular meaning.² The object of the bond is to provide security to the officer and indemnity to the defendant. The action on the bond ought to be conducted with these ends in view, to best subserve the principles of justice, having due regard to the decision in the replevin suit, and the character and condition of the bond, and the breaches assigned. When the action of replevin was dismissed, and the defendants in the suit on the bond were defaulted, the court, on a writ of inquiry to assess damages, permitted them to show, in mitigation, that they were the owners of the property.³ This rule has been engrafted into the statutes of some States, and adopted by construction in others.⁴

§ 428. **Right of action accrues upon a failure to keep any of the conditions.** The right of action on the bond accrues whenever the plaintiff in the replevin suit fails to keep any of the conditions. Thus, when the conditions of the bond are that the plaintiff shall prosecute his suit with effect, and without delay, and return the goods, if return be awarded, the suit on the bond may be sustained when the plaintiff fails in his action, even though there be no award of a return.⁵

§ 429. **Rights of the securities.** The securities may, in all cases, stand upon the exact terms of their contract.⁶ They are liable for their express covenants, and no more. They are responsible for the performance of what their principal is lawfully bound to do, according to the condition of the bond. The court cannot enlarge or vary the conditions of the contract.

title v. Bailey, 2 Cowper, 600; Archibald v. Thomas, 2 Cowen, 284; Wolfe v. McClure, 79 Ill. 564.

¹ *Ib.*

² Hawes v. Smith, 3 Fairfield, (Me.) 429.

³ Belt v. Worthington, 3 Gill. & J. (Md.) 247; Stockwell v. Byrne, 22 Ind. 9; Doogan v. Tyson, 6 Gill. & J. (Md.) 453; Davis v. Harding, 3 Allen, 303.

⁴ Statutes of Ill.

⁵ Brown v. Parker, 5 Blackf. (Ind.) 291; Potter v. James, 7 R. I. 312; Roman v. Stratton. 2 Bibb. (Ky.) 199.

⁶ Fullerton v. Miller, 22 Md. 5; Tarpey v. Shillenberger, 10 Cal. 390; Clary v. Rolland, 24 Cal. 147; Clark v. Norton, 6 Minn. 412.

Thus, where the condition was to prosecute the suit to final judgment, and to pay such damages and costs as the defendant should recover, and also restore the property in case that should be the judgment of the court, the defendant omitted to pray for a return, and had judgment for costs only, he afterwards brought suit on the bond for a failure to return, and it was held he could not recover, no return having been adjudged, that condition was not broken.¹ Where a return of the property is awarded, the securities have a right to make it, if they see fit, in the discharge of their obligation.² Where the suit was dismissed before the defendant had an opportunity to claim a return, the fact that one had not been claimed could not be made use of to defeat the suit on the bond.³ The suit, in such case would properly have been on the failure to prosecute with effect.

§ 430. **The same. Illustrations.** Where the condition was to pay such damages as should be adjudged, the bondsmen were not liable for those which accrued prior to judgment for a return, unless they were adjudged against their principal in the replevin suit.⁴ The principles which govern in such cases find apt illustrations in cases other than in those on replevin bonds.⁵ When the statute under which an appeal was taken required a bond to pay whatever judgment might be rendered upon the dismissal or trial of the appeal, and the bond sued on omitted the words "*or trial*," the court said: "The point is, can the obligors be held responsible by implication beyond the express terms of the bond?" *Held*, that though not conforming to the statutory form, the bond was good, as a voluntary one; that the obligor could not be bound for anything

¹ *Pettygrove v. Hoyt*, 11 Maine, 66; *Clark v. Norton*, 6 Minn. 413. See *Branscombe v. Scarbrough*, 6 Adol. & E. (N. S.) 13; *Chambers v. Waters*, 7 Cal. 390; *Mitchum v. Stanton*, 49 Cal. 304; *Collins v. Hough*, 26 Mo. 150; *Balsley v. Hoffman*, 13 Pa. St. 606; *Miller v. Foutz*, 2 Yeates, (Pa.) 418; *Nickerson v. Chatterton*, 7 Cal. 568.

² *Kimmel v. Kint*, 2 Watts, 432.

³ *Mills v. Gleason*, 21 Cal. 275.

⁴ *Sopris v. Lilley*, 2 Col. 498; *Kenley v. Commonwealth*, 6 B. Mon. (Ky.) 583.

⁵ *Wolfe v. McClure*, 79 Ill. 564.

beyond the letter of the contract.¹ When the bond was given in a justice court, and the condition was for a return of the property, if return be adjudged by *said* court, etc.: *Held*, that under this form the securities had limited their liability, and that unless the return was awarded by the justice, the securities were not liable, even though a return had been awarded by the county court.²

§ 431. **The same.** A judgment irregularly entered for the value of the property replevied, without an order for a return, does not change or affect the liability of the securities upon the condition for a return, though an order for a return may not be essential to entitle the party to an action upon the bond for a breach of other conditions.³

§ 432. **Any material alteration in the bond avoids it.** Any material alteration of the bond without the consent of the securities, will avoid it. Thus, when the principal erased his name from a bond to a United States Marshal without the consent of his securities, but with the consent of the marshal, it operated as a release of the securities.⁴ In case a new defendant is substituted in the suit, the securities are under no obligation to him;⁵ but the substitution by the court of the real defendant (a corporation,) in place of one of its agents, will not release the securities.⁶ The securities are not liable for a greater sum than the penalty of the bond and costs, even if the damages should exceed that amount,⁷ neither are they liable for costs of the replevin suit unless the bond expressly so provides, or some statutory liability attaches.⁸

§ 433. **The same.** Security bound by acts of the principal. Nevertheless, the securities are bound by all the steps which their principal may take in good faith for the success of his suit in court, and are bound by the result of that suit. If the

¹ *Young v. Mason*, 3 Gilm. (Ill.) 57.

² *Mitchum v. Stanton*, 49 Cal. 304.

³ *Mason v. Richards*, 12 Iowa, 74.

⁴ *Martin v. Thomas*, 24 How. (U. S.) 316.

⁵ *Smith v. Roby*, 6 Heisk. (Tenn.) 547.

⁶ *Hanna v. International Petroleum Co.*, 23 O. St. 625.

⁷ *Fraser v. Little*, 13 Mich. 195; *Nickerson v. Chatterton*, 7 Cal. 571.

⁸ *Morrow v. Shepherd*, 9 Mo. 216.

court have jurisdiction, the securities are bound by such order as it may make in the case, it being the essence of the contract that the security is answerable for his principal's conduct in the suit before judgment, and for his action afterwards within the scope of the bond.¹

§ 434. **But a settlement does not bind nor discharge them.** A settlement or adjustment of the suit by agreement of the parties, without the consent of the securities, will not bind them, nor will it necessarily release them from their obligations.² Where it was stipulated of record that all proceedings in replevin should cease, that the plaintiff should pay a certain sum, and that the bond should stand for security; *held*, that this was sufficient evidence of a failure to prosecute, and that the securities were liable though not bound by the stipulation.³

§ 435. **Submission to arbitration does not bind security.** So a submission to arbitration by consent of the parties and without the consent of the securities, will release them; they were bound that the plaintiff should abide all orders of the court properly made, but they were not bound by the orders of another tribunal to which the case is submitted by agreement.⁴

§ 436. **Technical defenses to bond not favored** The general rule is well settled that the plaintiff in replevin who has had the property delivered to him on his writ, cannot dispute the validity of the bond on any mere technical grounds, or for any failure to comply with the statutory process as to the manner of its execution. The rule in all such cases seems to be based on the idea that the party who has obtained delivery of the property by virtue of his suit, and by filing his bond, has had all the benefit which would accrue if the bond had been formal, and is estopped from questioning its validity on the

¹ *Pirkins v. Rudolph*, 36 Ill. 310; *Burrall v. Vanderbilt*, 1 Bos. (N. Y.) 637.

² *Moore v. Bowmaker*, (1 E. C. L.) 6 Taunt. 379; *Same v. Same*. 7 Taunt. 97; *Aldridge v. Harper*, 10 Bing. 118; *Harrison v. Wilkin*, 69 N. Y. 413; *Coleman v. Wade*, 2 Seld. (N. Y.) 44.

³ *Hallett v. Mountstephen*, 2 Dow. & Ry. 343.

⁴ *Pirkins v. Rudolph*, 36 Ill. 307. Compare *Leighton v. Brown*, 98 Mass. 516.

ground of formal or technical defects. The defendant cannot be allowed to plead that the bond was for ease and favor, and unconstitutional.¹ In *Morse v. Hodsdon*, 5 Mass. 314, and in *Simonds v. Parker*, 1 Met. 514, the rule is strongly laid down that when the bond, under which he has obtained the property, has been voluntarily executed by the plaintiff, he can not avoid it, on the ground that it does not conform to the statutory requirements.² So, error in recital of the date of the commencement of the suit in replevin is immaterial, when the suit and the property are sufficiently described to indicate the suit which was intended. Where the recital was that the suit was commenced on or about the 3d day of August, while the transcript showed that it was commenced on the 20th day of August, held immaterial.³

§ 437. **The same.** The courts have ever been inclined to hold the obligors on the bond to a strict liability. When it has been given and the property taken, no technical defects not going to the substance of the contract will be permitted to excuse the makers, neither will a failure of the defendant to take advantage of such defects in the replevin suit necessarily prevent him from having his remedy upon the bond.⁴ When the bond is given with one security, and the statute requires two, it may, nevertheless, be enforced, though not such a bond as the plaintiff had a right to demand.⁵ Where the signature of one of the securities was a forgery, the bond was not for that reason void against the other;⁶ but perhaps he might have shown that the bond was delivered in escrow to

¹ Compare *Weaver v. Field*, 1 Blackf. 335; *Magruder v. Marshall*, 1 Blackf. 333; *Strong v. Daniel*, 5 Ind. 348. See, also, *Parker v. Simonds*, 8 Met. 211; *Wolfe v. McClure*, 79 Ill. 564; *Gordon v. Jenney*, 16 Mass. 465. Objection that the condition was to appear at county court, when there was no such court, was overruled; the judges holding that the court of common pleas was intended. *Arnold v. Allen*, 8 Mass. 149.

² But, see *Purple v. Purple*, 5 Pick. 226.

³ *Graves v. Shoefelt*, 60 Ill. 464. Bond adjudged void is no bar to an action on the case for the value of the goods. *Magill v. Casey*, 1 Day, (Conn.) 13.

⁴ *O'Grady v. Keyes*, 1 Allen, (Mass.) 284.

⁵ *Wolcott v. Mead*, 12 Met. 518; *Shaw v. Tobias*, 3 Comst. (N. Y.) 192.

⁶ *Bigelow v. Comegys*, 5 Ohio St. 256.

be signed by the others if such was the fact. When the bond is for less than double the value of the property, (as required by the statute,) it is not therefore void; defendant may waive the defects and accept it.¹ When the securities were excepted to by the defendant under a statute authorizing such exception, and they failed to justify; that fact does not relieve them of their liability, though perhaps the substitution of new securities under such circumstances would.² Where the principal agreed to give time or to stay execution, such agreement did not release the securities unless the agreement created an absolute disability on the part of the payee to proceed.³ Where the plaintiff in the replevin suit has obtained possession of the property under the writ, neither he nor his securities can be permitted to allege in an action on the bond that no suit in replevin was pending, because no summons was issued.⁴

§ 438. **The liability of a guardian personal.** Where a guardian sued out a writ of replevin for goods belonging to his ward, and gave bond in his own name, he was held individually liable, and could not set up his guardianship to defeat the suit.⁵

§ 439. **Where the words are ambiguous, the intent will govern.** When the words of the bond are not explicit, or, if construed literally, would mean nothing, they must be construed with reference to the intent of the parties,⁶ and if such intent can be gathered from the terms of the bond and the situation of the parties, it will control. When the bond was that if *North*, (plaintiff,) prosecute, etc., or in case of failure shall pay such damages as the said *North* shall recover, etc., *held*, that this must be regarded as a clerical error, the presumption being that the bond was given in good faith, and such a construction should be given as would render it avail-

¹ *Rodesbaugh v. Cady*, 1 West L. M. (Ohio,) 599.

² *Van Duyne v. Coope*, 1 Hill, 557; *Decker v. Anderson*, 39 Barb. 347.

³ *Tousey v. Bishop*, 22 Iowa, 178.

⁴ *Reeves v. Reeves*, 33 Mo. 28; *Sammons v. Newman*, 27 Ind. 508.

⁵ *Oliver v. Townsend*, 16 Iowa, 430.

⁶ *Teall v. Van Wyck*, 10 Barb. 377.

able for the purpose for which it was intended.¹ When the condition of the bond was that it should be void if the obligor should "*not*" pay, etc., the palpable error in the introduction of this word was not permitted to defeat what must have been the true intent of the parties.² So when the word "pounds" was omitted, Lord TENTERTON said: "The bond was intended to secure various sums stated in the recitals, in pounds sterling, so I cannot doubt the obligor should be held to pay pounds sterling on this bond."³ When the bond was signed by plaintiff in replevin after the writ was served, he will not be permitted to set that up to defeat his own bond.⁴ All these cases proceed upon the ground that the plaintiff ought not to be suffered to avail himself of the writ to obtain the goods, and then be relieved of the obligation to respond, unless the error be fundamental.⁵ But when the bond did not contain the name of the defendant in the suit, it was void, and the defect could not be cured by averment or proof. Thus, when suit was brought against the sheriff for a failure to take bond as required by the statute, the defendant pleaded that he did take bond, which he set out at length, but the bond set out failed to show that the defendant's name was inserted therein, or that any language was used from which it could be ascertained in what suit the bond was given. Demurrer to the plea was properly sustained.⁶

§ 440. Proceedings on the bond governed by statute. Provision is made in some of the States for a summary proceeding⁷

¹ *Green v. Walker*, 37 Me. 27. See *Butler v. Wigge*, 1 Saund. 65; *Waugh v. Bussel*, 5 Taunt. 707.

² *Bache v. Proctor*, Doug. (Eng.) 367.

³ *Coles v. Hulme*, 8 Barn. & Cress. 568.

⁴ *Cady v. Eggleston*, 11 Mass. 285; *Nunn v. Goodlett*, 5 Eng. (Ark.) 100; *Reeves v. Reeves*, 33 Mo. 28.

⁵ *Buck v. Lewis*, 9 Minn. 317; *Jennison v. Haire*, 29 Mich. 214; *Decker v. Judson*, 16 N. Y. 439; *Shaw v. Tobias*, 3 Comst. 192; *Moors v. Parker*, 3 Mass. 310.

⁶ *Arter v. The People*, etc., 54 Ill. 228. This case was subsequently cited and approved in *Matthews v. Storms*, 72 Ill. 321. See *Smith v. Roby*, 6 Heisk. 549.

⁷ Stat. Missouri. *Contra*, see *Gay v. Morgan*, 4 Bush. (Ky.) 606; *Hurd v. Gallaher*, 14 Iowa, 394.

on the bond. In Wisconsin, the securities are so far regarded as parties to the suit as to authorize judgment against them in the replevin proceedings;¹ and the obligee may sue in the name of the sheriff for his use.² These proceedings are governed by the local law, and can only be resorted to when the bond is in strict conformity thereto.³

§ 441. **Debt a proper form of action thereon.** Debt is a proper form of action on a replevin bond in States where the distinction between actions is preserved.⁴ The usual form of declaration in debt upon a penal bond will be sufficient with the assignment of such breaches of the conditions as the pleader desires and expects to sustain by proof. The assignment of the breaches is simply a statement that the defendant has not performed the conditions which were essential to be kept to excuse the obligors from the payment of the penal sum named in the bond. The breaches need not be assigned in broader terms than the conditions.⁵

§ 442. **Assignment of the breaches.** Neither is the assignment of the breach required to be in any formal or technical manner. An assignment which sufficiently shows that the obligors have not kept one or more of the conditions is sufficient. Thus, when the condition was to prosecute the suit with effect an assignment that the defendant did not prosecute the replevin suit with effect, but failed so to do, in the words of the condition will be sufficient.⁶

§ 443. **Proceedings in the replevin essential to sustain suit upon the bond.** The proceedings in the replevin suit are

¹ *Manning v. Pierce*, 2 Scam. 6. See *Gould v. Warner*, 3 Wend. 54. *Contra*, in North Carolina, where the remedy is by *sci. fa.* *Summers v. Parker*, Taylor's N. C. Term Rep. 147.

² *Hunter v. Sherman*, 2 Scam. 544; 2 Ch. Plead. 464. See *Keyes v. McNulty*, 14 Iowa, 484.

³ *Hunter v. Sherman*, 2 Scam. 544; 2 Chit. Plead. 460; *Perreau v. Bevan*, 5 B. & Cress. 284; *Axford v. Perrett*, 4 Bing. 586; *Harvy v. Stokes*, Willes, 6; *Peck v. Wilson*, 22 Ill. 205; *Hopkins v. Ladd*, 35 Ill. 180.

⁴ *Pratt v. Donovan*, 10 Wis. 378. See *Hershler v. Reynolds*, 22 Iowa, 152; *Crites v. Littleton*, 23 Iowa, 205.

⁵ *Humphrey v. Taggart*, 38 Ill. 228.

⁶ *Wooldridge v. Quinn*, 49 Mo. 427; *Miller v. Commissioners of Montgomery Co.*, 1 Ohio, 271; *Humphrey v. Taggart*, 38 Ill. 228.

essential to sustain suit upon the bond. The record of the replevin suit need not be set out in the declaration on the bond, but the proceeding should be recited,¹ and the judgment in that suit stated,² the record in the replevin suit is proper evidence to sustain the averment in the declaration.³

§ 444. **The material facts to be set up.** The material facts to be alleged in a suit on a replevin bond are manifestly the termination of the replevin suit, judgment for the defendant, and an order for a return of the property, if that be the fact. When the declaration upon the bond alleged concerning the replevin suit, that "said cause coming for trial," it was considered and adjudged by said circuit court, that "the said Stevison take nothing by his said writ, but that he and his pledge to prosecute be in mercy," and further, at the same time the court awarded a return of said goods, etc., and gave judgment for the defendants for one cent damages and costs of suit—the record read in evidence to sustain the averment, after reciting that a previous order had been made requiring the plaintiff to give security for costs, and that a motion to dismiss for non-compliance with that order had been made, proceeded: "It is ordered by the court that said motion be sustained, and that this suit be dismissed at plaintiff's costs, and that a writ of *retorno habendo* issue herein, and judgment for costs"—it was *held*, no substantial variation from the declaration.⁴ When the law permits the defendant to give bond and retain the property, it is essential to aver that the property was delivered, delivery necessarily preceding liability upon the bond;⁵ even when there is no evidence that any bond was given, it must be presumed the property remained with the defendant, and a finding in his favor will not authorize a judgment for a return without proof that the property was

¹ Gould v. Warner, 3 Wend. 57; Eldred v. Bennett, 33 Pa. St. 183; Sand. Pl. and Ev. 769; McGinnis v. Hart, 6 Iowa, 204; Dias v. Freeman, 5 T. R. 195 and 104.

² Nunn v. Goodlett, 5 Eng. (Ark.) 89.

³ McGinnis v. Hart, 6 Iowa, 208.

⁴ Stevison v. Earnest, 80 Ill. 517.

⁵ Nickerson v. Chatterton, 7 Cal. 570. See, also, Bolander v. Gentry, 36 Cal. 110.

delivered on the writ.¹ It need not be averred that the writ was directed to the coroner. If it show that the coroner took the goods upon the writ, it is *prima facie* that the writ was directed to him;² neither is it necessary to aver that the bond was taken in compliance with the statute,³ but the declaration must state the plaintiff's damages.⁴

§ 445. **When bond is lost from the files.** Where the bond has been lost from the files, it cannot be replaced by a substitute without the approval of the court; neither the party nor the clerk, without the sanction of the court, can substitute a paper purporting to be a copy, unless in compliance with an order for that purpose.⁵

§ 446. **Defenses to suit on bond.** In an action upon the bond, the defendant who has availed himself of its benefits by obtaining property under it, cannot defeat his liability by plea that the bond was given for ease and favor, or that the law was unconstitutional;⁶ neither can he be permitted to plead that he was not indebted,⁷ nor show a want of jurisdiction in the court before whom the replevin suit was tried.⁸ In *Roman v. Stratton*, 2 Bibb, (Ky.) 199, the court held that irregularities of the plaintiff in the procurement of the writ or the prosecution of the replevin suit, would not excuse him from liability on his bond; and this case was cited with approval in a leading case in Arkansas.⁹ To permit the party to avail himself of this objection would be to allow him to take advantage of his own wrong. The bond was the plaintiff's voluntary bond, delivered to the officer, upon which he obtained possession of the goods, and he and his securities must abide it;¹⁰ and this rule applies generally to the defense of instru-

¹ *McKee v. Freeman*, 25 Ind. 151.

² *Shaw v. Tobias*, 3 Comst. (N. Y.) 191.

³ *Shaw v. Tobias*, 3 Comst. (N. Y.) 191.

⁴ *Arnold v. Allen*, 8 Mass. 149.

⁵ *Farrow v. Orear*, 2 Duv. (Ky.) 261.

⁶ *Magruder v. Marshall*, 1 Blackf. 333.

⁷ *Warner v. Matthews*, 18 Ill. 83.

⁸ *McDermott v. Isbell*, 4 Cal. 113.

⁹ *Nunn v. Goodlett*, 5 Eng. (Ark.) 90.

¹⁰ *Roman v. Stratton*, 2 Bibb, (Ky.) 199; *Morse v. Hodsdon*, 5 Mass. 314.

ments of this character.¹ The defendant in replevin may waive all defects in the bond which do not go to the substance or defeat his right of action, and enforce the bond against the principal and securities.² So where the securities are excepted to and fail to justify, it will not defeat the plaintiff's right to recover, as though exceptions had not been taken.³ The defendant in replevin is in all cases liable to the judgment authorized by law, without any reference to the conditions of the bond. The bond fixes the liability of the securities.⁴ When the securities are excepted to and fail to justify, such failure does not discharge them. Query, as to whether the substitution of a new bond would be a discharge of the securities on the old.⁵

• § 447. **When ownership of property is settled in the replevin suit.** When the ownership of the property has been determined in the replevin suit, it is regarded as settled; and in a suit upon the bond in such a case, a plea that the defendant, the plaintiff in the replevin suit, is the owner of the property, is bad.⁶ So, also, of a plea of property in a third person;⁷ and in fact all questions determined in the replevin suit are regarded as *res adjudicata*, and cannot be inquired into in suit upon the bond.⁸

§ 448. **When not so settled, it may be set up in suit on the bond.** But when the title and right of possession are not settled in the replevin suit, defendant to suit on bond may plead that fact, and that the ownership and right of possession are in him, and a plea to all but nominal damages would be sufficient.⁹ Under the statutes of Illinois, the defendant

¹ *Fant v. Wilson*, 3 Mon. (Ky.) 342.

² *Shaw v. Tobias*, 3 Comst. (N. Y.) 188; *Wolcott v. Mead*, 12 Met. (Mass.) 517.

³ *Decker v. Anderson*, 39 Barb. 347.

⁴ *Creamer v. Ford*, 1 Heisk. 308.

⁵ *Van Dyne v. Coope*, 1 Hill, 559.

⁶ *Sherry v. Foresman*, 6 Blackf. 56; *Davis v. Crow*, 7 Blackf. 130; *Williams v. Vail*, 9 Mich. 162; *Cushenden v. Harman*, 2 Tyler, (Vt.) 431.

⁷ *Smith v. Lisher*, 23 Ind. 504.

⁸ *Denny v. Reynolds*, 24 Ind. 248; *Wallace v. Clark*, 7 Blackf. 298.

⁹ *Stockwell v. Byrne*, 22 Ind. 9. See *Wiseman v. Lynn*, 39 Ind. 250; *Davis v. Harding*, 3 Allen, 302; *Belt v. Worthington*, 3 Gill. & J. (Md.) 247; *Hawley v. Warner*, 12 Iowa, 42.

pleaded to an action upon the bond that the property in the replevin suit was his, and that the merits of the case were not tried there, but that the return was awarded only because the plaintiff failed to prove a demand.¹ Such a plea, however, must affirmatively show that the case is within the provisions of the statute by clear and distinct averments; also, that the merits were not determined in the replevin suit; and such a plea, it seems, should admit nominal damages.²

§ 449. **Defenses which should be made in the replevin suit.** Plea that one of the defendants had carried away the property and converted it to his use, is bad. That defense should have been made in the replevin suit, and then no return would have been awarded; or, perhaps the same facts might sustain a plea that the property was returned.³ So, also, plea that the judgment in the replevin was obtained by fraud;⁴ or, that the suit in replevin was dismissed by agreement, is bad.⁵ A plea which sets up a return to the sheriff, and does not answer the part which charges failure to prosecute with effect, is bad,⁶ though a return may be pleaded in mitigation of damages.

§ 450. **Miscellaneous rules in suits on bond.** It is a general rule that the defendants to suit on bond cannot set up any irregularities in the replevin suit in order to defeat suit on the bond.⁷ When the practice act required an affidavit of merits to a plea in an action upon a contract for payment of money, a plea to suit on a replevin bond was properly filed without affidavit.⁸ Where the issues in the replevin suit involved title to the property, and a verdict was given for the defendant in a suit upon the bond, the defendant could not

¹ The plea is set out in full in *Chinn v. McCoy*, 19 Ill. 606. See Laws Ill., 1847, p. 62; Rev. Stat. Ill. 1874, 853; *Warner v. Matthews*, 18 Ill. 83.

² *King v. Ramsay*, 13 Ill. 622.

³ *Buckmaster v. Beames*, 4 Gilm. (Ill.) 443; *Sherry v. Foresman*, 6 Blackf. 58.

⁴ *Hutton v. Denton*, 2 Carter, (Ind.) 644.

⁵ *O'Neal v. Wade*, 3 Porter, (Ind.) 410.

⁶ *Gould v. Warner*, 3 Wend. 61.

⁷ *Jennison v. Haire*, 29 Mich. 207; *Decker v. Judson*, 16 N. Y. 439; *Shaw v. Tobias*, 3 Comst. 192; *Moors v. Parker*, 3 Mass. 310; *Buck v. Lewis*, 9 Minn. 317.

⁸ *Peck v. Wilson*, 22 Ill. 206.

set up a new title acquired after the bond was given;¹ but may show that since the judgment for the return, the interest of the plaintiff has ceased in mitigation, but not in bar of damages; or, that the property will at once revert to the defendant;² or, he may plead set off, the suit upon the bond being an action on a contract, subject to set off like other actions, though replevin is not subject to set off;³ or, may plead performance of the condition of the bond, and require the plaintiff to state the breaches of the condition upon which he expects to rely;⁴ or, a release of all demands executed by the plaintiff in the suit on the bond, to the principal obligor thereon, is a release of the bond.⁵ A judgment for costs only in the replevin suit, and return of execution thereon satisfied, is a discharge of the securities.⁶ To suit on bond the defendant pleaded: 1. *Non damificatus*. 2. If the plaintiff was injured it was by his own wrong. 3 and 4. That the goods belonged to the principal obligor. 5. That the principal obligor was ready and willing to prosecute his suit with effect, but that the court at the instance of the plaintiff dismissed the suit for want of jurisdiction on account of defects apparent in the affidavit and the writ, and that no damages were recovered in the replevin suit; nor was a return of property awarded. 6. That the bond was executed without consideration. 7. That the consideration was illegal. 8. No record of the replevin suit. On demurrer the court held these pleas, except the last, were bad.⁷

§ 451. **Variation between the bond and affidavit in description, no defense.** A variation in description between the property in the affidavit and the bond, will be no defense to suit on bond. That should have been pleaded in the replevin;⁸

¹ Carr v. Ellis, 37 Ind. 465.

² Tuck v. Moses, 58 Maine, 461.

³ Balsley v. Hoffman, 13 Pa. St. 612; Miller v. Foutz, 2 Yeates, 418.

⁴ Doogan v. Tyson, 6 Gill. & J. (Md.) 453.

⁵ Thomas v. Wilson, 6 Blackf. (Ind.) 203; Cocks v. Nash, 9 Bing. 341; Tuttle v. Cooper, 10 Pick. 281.

⁶ Millett v. Hayford, 1 Wis. 401.

⁷ Sherry v. Foresman, 6 Blackf. 56.

⁸ McDermott v. Doyle, 11 Mo. 443.

neither can the defendant to suit on bond be permitted to object to the judgment in the replevin suit, on the ground that the writ issued without an affidavit; that the court would in the absence of the affidavit from the record, presume that it was properly filed; or, if not, will not permit a plaintiff in replevin, who managed the case and who obtained the property, to reap all the benefits of his suit and then escape liability in a suit on his bond, on the ground that he procured the writ and obtained delivery of the property without affidavit, or committed other irregularities to defeat it;¹ neither will the fact that the defendant has collected his costs in the replevin suit. The conditions of the bond are separate, and the collection of costs is not a surrender of his right of action.²

§ 452. **Submission of the replevin suit to arbitration, a defense.** But a submission of the replevin to an arbitration by agreement of the parties without the consent of the securities, will discharge the latter. Had the suit been prosecuted, the court might have awarded a return. This would have enabled the securities to take steps for a deliverance. They did not agree to return without an investigation, and were entitled to have that investigation under the forms of trial by the court and jury.³

§ 453. **Value of the property stated in bond; how far binding.** The plaintiff in replevin who fixed the value of the property as stated in the bond, is bound by that value, and estopped from questioning it, when sued on the bond;⁴ and as a usual thing, such value also concludes the sureties who sign the bond, but the defendant, in replevin, had no concern in fixing the value,⁵ and is not bound by any of the recitals in

¹ *Jennison v. Haire*, 29 Mich. 208.

² *Kafer v. Harlow*, 5 Allen, 348.

³ *Pirkins v. Rudolph*, 36 Ill. 312; *Moore v. Bowmaker*, 6 Taunt. 379; *Aldridge v. Harper*, 10 Bing. 118; *Coleman v. Wade*, 2 Seld. (N. Y.) 44; *Bowmaker v. Moore*, 1 Exch. R. 355.

⁴ *Wiseman v. Lynn*, 39 Ind. 259; *Trimble v. State*, 4 Blackf. 435; *May v. Johnson*, 3 Ind. 449; *Guard v. Bradley*, 7 Ind. 600; *Sammons v. Newman*, 27 Ind. 508; *German Ins. Co. v. Grim*, 32 Ind. 249; *Mattoon v. Pearce*, 12 Mass. 406; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 34; *Clap v. Guild*, 8 Mass. 153.

⁵ *Howe v. Handley*, 28 Me. 251; *Melvin v. Winslow*, 10 Me. 397; *Parker v. Simonds*, 8 Met. 205; *Thomas v. Spofford*, 46 Me. 410; *Tuck v. Moses*, 58

the bond; neither will an appraisal of the value under a statute authorizing it, be binding on the parties.¹

§ 454. **Where the value of a number of articles is stated at a gross sum.** When, as is sometimes the case, a number of articles are replevied, and the bond sets out the aggregate value, and some are returned and some are not, the recital of the aggregate value in the bond affords no information as to the value of separate articles; the plaintiff in the suit must show the actual value, or he can have but nominal damages.²

§ 455. **Effect of the destruction of the property.** The conditions of the bond sometimes become impossible to perform by the death or destruction of the chattel. When domestic animals are the subject of the action, they are liable to die; in fact, all chattels are liable to be destroyed pending the suit.³ If the possession of the defendant be wrongfully acquired, in violation of a trust, or by fraud or force; or, where the claim is characterized by tort and injustice, he cannot shield himself from payment of value, even though the property may have been destroyed.⁴

§ 456. **Parties to suit on bond cannot discharge it to the injury of the sheriff.** In suit on bond, by the sheriff, he sues for his own protection; and, if this be pending, the defendants cannot release the bond, the sheriff having become responsible for costs. A release of the bond before suit would extinguish it; the sheriff would have no further interest in it, and would stand discharged from his liability.⁵ If the suit, however, has been begun by the defendant in replevin in his own name, he may release the bond, as in that case he alone is

Me. 477. See in this connection, *Leonard v. Whitney*, 109 Mass. 265; *Wright v. Quirk*, 105 Mass. 48; *Stevens v. Tuite*, 104 Mass. 328. "The sum named in the bond as the value of the goods, is sufficient evidence, though not absolutely conclusive on the makers." *Clap v. Guild*, 8 Mass. 153; *Mattoon v. Pearce*, 12 Mass. 406; *Wright v. Quirk*, 105 Mass. 48.

¹ *Kafer v. Harlow*, 5 Allen, (Mass.) 348; *Leighton v. Brown*, 98 Mass. 515.

² *Sopris v. Lilley*, 2 Col. 498.

³ *Carpenter v. Stevens*, 12 Wend. 589.

⁴ *Porter v. Miller*, 7 Tex. 480. See title, Damages; *post*. As to damages for breach of contract occasioned by the act of God, see Sedgwick on Dam., 6 Ed., p. 255, note 2.

⁵ *Armstrong v. Burrell*, 12 Wend. 302.

liable for costs.¹ The judgment for return cannot be impeached upon the ground of fraud on the part of the plaintiff in letting the judgment go.²

§ 457. **Damages on bond; how assessed.** In an action on the bond, the damages are assessed on the principle of compensation. The sum named in the bond is usually regarded as a penalty, and upon payment of a sum sufficient to compensate the obligor for the loss he has sustained, the bond will be discharged. By the common law the makers of the bond were liable for the full amount of the penalty named, but in case of hardship chancery frequently interposed relief; and at length, by the statute,³ it was provided that in actions on bonds with penalties, the defendant might pay the principal debt, with interest and costs, and the penalty might be discharged.⁴ The judgment is for the full penalty of the bond, but the judgment is usually accompanied by an order that it be satisfied by the payment of a less sum, which is fixed at the amount of damages the plaintiff has sustained.⁵ The bond in replevin is statutory, and is properly classed with other statutory bonds given to secure the defendant against damages resulting from the wrongful use of a provisional remedy. As such, the remedy upon the bond is governed by the same principles substantially as those which govern in the case of injunction and attachment bonds. The sum named as the penalty is for the purpose of indemnity only, not the measure of the injured party's right of recovery, when his actual damage is less than that sum. The value of the goods

¹ *Armstrong v. Burrell*, 12 Wend. 302.

² *Walls v. Johnson*, 16 Ind. 374.

³ 4 Anne, Chap. 16, §§ 12 and 13.

⁴ See Stat. 8 and 9 Will. 3, Ch. 11, § 8. When the judges refused to grant relief at law, after forfeiture of bonds, upon payment of the principal, interest and costs, Sir THOMAS MOORE swore by the body of God he would grant an injunction. *Wyllie v. Wilkes*, Doug. (Eng.) 523, (505.) The statutes in several of the States limit the recovery on the bond to compensation for such damages as have been sustained in consequence of the breach of the conditions. R. S. Ill. 1874, p. 853, § 25.

⁵ *Gould v. Warner*, 3 Wend. 54; *Hunter v. Sherman*, 2 Scam. 544; *Odell v. Hole*, 25 Ill. 208; *Frazier v. Laughlin*, 1 Gilm. 347; *March v. Wright*, 14 Ill. 248; *Toles v. Cole*, 11 Ill. 562.

which have been ordered to be returned, and have not been restored in compliance with the order, with interest, will usually be the measure of damages in such cases.¹

§ 458. **The same; amount of.** The amount of damages in an action on a replevin bond must depend materially on the right of the plaintiff (defendant in replevin) to the property. If it is determined in the replevin suit that the property belonged to him, then in suit on the bond he ought to have a right to recover its value; but if it appear that he had no right to the property, he has sustained no damage by the refusal of the obligor to deliver it to him, and in such case, unless other actual damages are shown, the plaintiff's should be nominal.²

§ 459. **The same, in case of joint owners.** When a landlord was joint owner with his tenant, and so defeated the action of replevin, and had judgment for a return, yet in a suit on the bond for a failure to comply with the order, the landlord was permitted to recover only the value of his interest in the property;³ and in this case the defendants in the suit on the bond were permitted, notwithstanding the judgment in replevin, to show the character of the possession upon which the plaintiff recovered.⁴ When the defendants in the replevin had a verdict and judgment, but it appeared that the goods taken had never been paid for by them, and that they could not be liable for their price, in suit on the bond they could not recover the value of the goods, but only the value of their interest.⁵

§ 460. **Release of bond by seizure on another writ pending suit.** When the property is delivered to the plaintiff on the writ, and pending the suit it is taken from him by the order of the court, the securities may set up that fact as a discharge.⁶

¹ Ormsbee v. Davis, 18 Conn. 555.

² Wallace v. Clark, 7 Blackf. 299; Belt v. Worthington, 3 Gill & J. (Md.) 247.

³ Mason v. Sumner, 22 Md. 312.

⁴ 1b.

⁵ Seldner v. Smith, 40 Md. 603.

⁶ Caldwell v. Gans, 1 Blake, (Mon.) 578. Compare Ackerman v. King, 29 Tex. 291; Kercheval v. Harney, Meigs, (Tenn.) 403.

The foundation for the rule seems to rest on the theory that property seized on a writ of replevin is in the custody of the court. Though in the plaintiff's possession, it is always within the power and control of the court, and if taken subsequently upon process from the same court, the seizure by the officer is equivalent to a return of the property to him,¹ and the securities on the bond ought not to be held responsible for property which has been taken from them by order of the court in whose control it was. To what length this doctrine may be carried is a question as yet undecided, so far as the cases examined disclose.²

§ 461. **Limitations to suit on bond.** The statute of limitations to a suit on bond does not begin to run until a judgment for return. A simple delay to prosecute the security for a shorter period than the time limited by law, will not discharge them.³

§ 462. **Suit on by sheriff may be in his individual name.** Suit by sheriff need not be in the name of his office; his individual name, with proper words of description, will be sufficient.⁴

¹ *Hunt v. Robinson*, 11 Cal. 262.

² Consult *Burkle v. Luce*, 1 Comst. (N. Y.) 163; *Lockwood v. Perry*, 9 Met. 444; *McRea v. McLean*, 3 Port. (Ala.) 138; *Evans v. King*, 7 Mo. 411; *Hagan v. Lucas*, 10 Peters, (U. S.) 400; *Lovejoy v. Bright*, 8 Blackf. 206.

³ *Daniels v. Patterson*, 3 Comst. 51.

⁴ *Caldwell v. West*, 1 Zab. (21 N. J.) 411.

CHAPTER XV.

THE WRIT.

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§ 463. To whom addressed, and the mandate. The writ is usually addressed to the sheriff; but if he is a party, it may be addressed to the coroner. When the writ was addressed to the sheriff, and was served by the coroner, the plaintiff was permitted to amend it by inserting the word coroner in the directory part.¹ In its usual form it contains a mandate to the officer to take and deliver the property described; though by statute, in many of the States, it may issue without the order for delivery. The mandate in the writ for the delivery of the goods is usually upon condition that the plaintiff shall first execute the bond, and upon the neglect of the plaintiff to do so, the sheriff cannot take the property. In other States the clerk takes the bond before issuing the writ, and in

¹ *Simcoke v. Frederick*, 1 Ind. 54.

such case the sheriff has no concern but to execute it. These matters depend entirely upon the local statutes.

§ 464. **Must contain summons to the defendant.** It must contain a summons to the defendant to appear in court and answer the plaintiff's claim; and the sheriff should serve it by summoning him; but if the defendant appears, an omission of the sheriff to serve it is waived.¹ It need not show that the affidavit required by the statute has been made,² nor that the bond has been filed; nor is it essential that it state the value of the property, though this is usual and proper. It may be issued for any property within the jurisdiction of the court at the time it is issued, and the subsequent removal of the goods to defeat the writ will not deprive the court of jurisdiction, if they are pursued and taken by the sheriff.³

§ 465. **Writ must describe the particular property.** The writ must describe the property to be seized and delivered, in such a manner that the sheriff, from the description, or from the description aided by inquiries, can find and deliver it. If, for any defect or uncertainty in the description, it is doubtful what property is to be taken, the sheriff may refuse to serve it;⁴ and if the writ omit to describe the goods to be taken, it will be quashed, even after appearance;⁵ but this is not necessary, unless the writ commands a delivery of the goods. When it is simply a summons, the articles need not be described.⁶ The description ought to be as full and particular as the circumstances of the case will warrant, so that if the officer can take part, but cannot find, or for any reason cannot take the remainder, he may do so, and make return of his doing under the writ.⁷

§ 466. **Alias writ.** Where the property has been seized and delivered upon the command of the original writ, but the de-

¹ *Swann v. Shemwell*, 2 Har. & G. (Md.) 283.

² *Magee v. Siggerson*, 4 Blackf. 70.

³ *Craft v. Franks*, 34 Iowa, 504.

⁴ *Smith v. McLean*, 24 Iowa, 324; *Snedeker v. Quick*, 6 Halst. (N. J.) 179; *Magee v. Siggerson*, 4 Blackf. 70.

⁵ *Snedeker v. Quick*, 6 Halst. (N. J.) 176; *De Witt v. Morris*, 13 Wend. 495.

⁶ *Finehout v. Crain*, 4 Hill, 537.

⁷ *Welch v. Smith*, 45 Cal. 230. See *ante*, § 169, *et seq.*

fendant has not been served or where the defendant was improperly served, an alias writ must issue.¹ So, when part or all of the goods embraced in the first writ were not obtained by the officer, an alias writ was allowed to issue for the purpose of obtaining them;² and in such case an alias writ may issue to any other county than that in which the suit was brought and defendant found, the same as in other cases where such writs are proper.³ Any other rule would compel the plaintiff to dismiss his suit, and perhaps do great injustice.⁴ The same practice has been recognized in New York⁵ and in Florida.⁶

§ 467. **Writ lies for property in the jurisdiction of the court when it issued.** It seems that the writ will lie for property which was within the jurisdiction of the court when it was issued, and that the sheriff may pursue and take it in another county;⁷ but upon this point the statutes of the different States, as to jurisdiction of the sheriff, may be at variance, and should be the guide to the officer.

§ 468. **The return of the writ.** The officer's return must show how he has executed the writ, set out, so that the court can see what has been done, and whether the mandate has been complied with. It ought to show, when such is the condition of the writ, that the sheriff has taken bond, and who the securities are.⁸

§ 469. **At common law, plaintiff took the property as his own, and might so dispose of it.** By the common law, the plaintiff took the goods delivered to him on his writ of replevin as his own property. He might sell or otherwise dispose of them pending the suit, as he saw fit. In the theory of that law the

¹ O'Brien v. Haynes, 61 Ill. 495.

² Maxon v. Perrott, 17 Mich. 335.

³ Hiles v. McFarlane, 4 Chand. (Wis.) 89.

⁴ O'Brien v. Haynes, 61 Ill. 495.

⁵ *Ex parte* Johnson, 7 Cow. 424; Snow v. Roy, 22 Wend. 602.

⁶ Branch v. Branch, 6 Fla. 315.

⁷ Craft v. Franks, 34 Iowa, 504.

⁸ Hays v. Bouthalier, 1 Mo. 345; Pool v. Loomis, 5 Ark. 110; Mattingly v. Crowley, 42 Ill. 300; Miller v. Moses, 56 Me. 134; Nashville, etc., v. Alexander, 10 Humph. 378.

property was his, and had been distrained by the defendant. The distrainer set up no claim to the ownership of the property. All he claimed was a right to seize and hold it as a pledge or security for rent, which he insisted was due him.¹ Upon replevin, in such cases, the plaintiff, by his writ, took his former title to the property, and gave security that he would show the distress to have been wrongful. The lien of the distrainer was gone, and its place supplied by the bond.²

§ 470. **Property now regarded as in the custody of the law.** In modern practice, cases of distress comprise but a small portion of the cases of replevin, and by the theory of the law in other cases, the ownership is determined by the result of the suit. Pending this, the property is regarded as in the custody of the law, though in the plaintiff's possession.³ The writ does not confer title to the property;⁴ but it seems, in many cases, that the plaintiff acquires such an interest in the property delivered to him on the writ as to entitle him to sell or dispose of it, the bond being regarded as sufficient to indemnify the other party for the value of the property in case latter succeeds.⁵ To describe the rights of a plaintiff to property delivered to him pending the suit is one of the most obscure and difficult problems. No general statement can be made without involving numerous exceptions.⁶

§ 471. **Injuries to goods while in plaintiff's possession.** If the goods are injured or decay while in plaintiff's possession, it must be at his risk; and in the case of fruit, fresh meat, vegetables, or perishable goods which are valuable only for immediate use or consumption, it would entirely defeat the object and purposes of the action if the plaintiff was

¹ Gilbert on Replevin, 55.

² 3 Bla. Com. 146; Lowry v. Hall, 2 W. & S. (Pa.) 134; Speer v. Skinner, 35 Ill. 282; Woglam v. Cowperthwaite, 2 Dall. (Pa.) 68; Frey v. Leeper, 2 Dall. 131; Bruner v. Dyball, 42 Ill. 35.

³ Bruner v. Dyball, 42 Ill. 34; Hardy v. Keeler, 56 Ill. 152; Stevens v. Tuite, 104 Mass. 332; Miller v. White, 14 Fla. 435; Milliken v. Selye, 6 Hill. 623. Compare Buckley v. Buckley, 9 Nev. 379.

⁴ Lovett v. Burkhardt, 44 Pa. St. 174; Burkle v. Luce, 6 Hill, 553.

⁵ Cary v. Hewitt, 26 Mich. 229.

⁶ See *post*, § 479, *et seq.*

obliged to keep them, (when from their nature they must perish,) and thus be responsible for their full value;¹ he cannot be allowed to return them in a damaged condition, without being liable for the damage.² When the property is valuable only for use, as, for example, a sewing machine or horse, the plaintiff is liable for the value of the use while it is in his possession,³ and has an undoubted right to put the property to use without being liable for depreciation resulting from the use. So where the property was valuable only for consumption, the plaintiff in the nature of things must put them to use or bear the loss which their decay or depreciation occasions.

§ 472. **Rights of the plaintiff to property taken on the writ.** If the plaintiff is the general owner of property seized on execution or attachment, he may, after the execution of a bond and the delivery of the property to him, sell it and confer upon the purchaser a good title; if he was not such owner, he could not.⁴ The restoration of the plaintiff's property to his possession invests him with full power to dispose of it. The execution of the bond, and delivery of the property under the writ, releases it from the lien of the execution, at least so far as that it may be sold and a good title conveyed to a *bona fide* purchaser.⁵

§ 473. **The same.** When the title and the possession both unite in one person, the fact that he acquired that possession by virtue of a writ of replevin will not debar him of the right to sell and convey a good title.⁶ So, where goods are distrained, the tenant may pay the rent and take his goods, discharged from the landlord's claim, or he may give bond and replevy

¹ *Gordon v. Jenney*, 16 Mass. 469; *Lockwood v. Perry*, 9 Met. 444; *Mennie v. Blake*, 6 E. & B. (88 E. C. L.) 843; *Stevens v. Tuite*, 104 Mass. 332.

² *Allen v. Fox*, 51 N. Y. 562.

³ See Sec. 579, *et seq.*

⁴ *Bradyll v. Ball*, 1 Bro. Ch. C. 428; *Gimble v. Ackley*, 12 Iowa, 31.

⁵ *Gimble v. Ackley*, 12 Iowa, 31; *Woglam v. Cowperthwaite*, 2 Dall. (Pa.) 68; *Frey v. Leeper*, 2 Dall. (Pa.) 131; *Burkle v. Luce*, 6 Hill, 558; *Jones v. Peasley*, 3 Greene, (Iowa,) 52; *Smith v. McGregor*, 10 Ohio St. 467. *Contra*, *Lockwood v. Perry*, 9 Met. (Mass.) 440; *Burkle v. Luce*, 1 Comst. (N. Y.) 163; *Hunt v. Robinson*, 11 Cal. 262.

⁶ *Donohoe v. McAleer*, 37 Mo. 312; *Burkle v. Luce*, 1 Comst. (N. Y.) 163.

the goods under a proper offer to show that the distress was wrongful; in the latter case, the lien of the landlord is gone; he must look to the security.¹

§ 474. **The same. Delivery on the writ does not confer title.** Delivery by virtue of the writ invests the plaintiff with the possession of the property, and pending the suit, the defendant, though he may be the owner, cannot disturb the plaintiff's right of possession. Such delivery, however, does not affect the question of ownership; it does not in any way tend to show title in the plaintiff; it is in fact but a temporary right which may terminate upon the discontinuance or abatement of the suit, or by judgment against the plaintiff.² So, where the plaintiff wrongfully sues out a writ of replevin and obtains possession of goods, and afterwards dismisses his suit, the defendant is not driven to a suit upon the bond, (unless it be in case of a distress,) but may sustain replevin for the property.³ Where goods are replevied from the possession of an agent or bailee of the owner, the latter, if a stranger to the proceeding, may sustain replevin from the plaintiff in the first suit.⁴

§ 475. **The same. Where the action is for a distress.** By replevin of goods distrained the lien of the distrainer is suspended, but if a return be awarded, and upon the service of the writ of return they are found in the possession of the defendant, (the plaintiff in replevin,) they may be taken and returned to the defendant.⁵

§ 476. **The effect of the writ on the rights of the parties pending the suit.** Under the statutes in this country, generally the effect of the writ is not to divest the title or the lien of the defendant; this is affected only by the judgment of

¹ *Bruner v. Dyball*, 42 Ill. 35; *Speer v. Skinner*, 35 Ill. 282.

² *Lovett v. Burkhardt*, 44 Pa. St. 174; *Speer v. Skinner*, 35 Ill. 282; *Bruner v. Dyball*, 42 Ill. 34.

³ *Bruner v. Dyball*, 42 Ill. 35.

⁴ *White v. Dolliver*, 113 Mass. 402; *Globe, etc., v. Wright*, 106 Mass. 207.

⁵ *Burkle v. Luce*, 6 Hill, 559; *Burkle v. Luce*, 1 Comst. (1 N. Y.) 163 and 239; *Bradyll v. Ball*, Bro. Ch. Rep. 427; *Woglam v. Cowperthwaite*, 2 Dall. 68; *Acker v. White*, 25 Wend. 614; *Frey v. Leeper*, 2 Dall. 131; *Anon. Dyer*, 280 b.

the court after a hearing. If the title could be divested by the execution of the replevin bond and delivery of the goods upon the writ, the primary object of the suit would be defeated—the unsuccessful party could always make his election to keep the goods or pay the value. This advantage was never intended by the statute to be given to a party clearly in the wrong. The effect of the replevin is simply to give the party the possession of the property pending the suit; the title is not changed. A sale made by the party so in possession, who afterwards turns out to have no title, cannot convey title to the purchaser against the real owner.¹ In California, it was said *in arg.* the real owner could in such case recover his property even from an innocent purchaser; that the property was in the custody of the law, and that all parties must take notice.² In the case of *Hagan v. Lucas*, 10 Peters, (U. S.) 400, Mr. Justice McLEAN said, on giving bond the property is placed in the possession of the claimant; his custody is the custody of the sheriff; the property is not withdrawn from the custody of the law. In the hands of a claimant under bonds to the sheriff for its delivery, it is as far from the reach of other process as it would have been in the hands of the officer.³ When one replevied colts, and before the suit was determined sold them; afterwards the suit was decided against him and a return awarded, the defendant in the suit replevied them from the purchaser and was permitted to recover on his antecedent title.⁴

§ 477. The same. When the sheriff seizes property upon an execution or attachment, and it is replevied from him, and afterwards he levies on and takes possession of it by virtue of another execution or attachment, it is equivalent to a return of the goods, and operates as a revival of the lien of the first process; in other words, the lien or special property which the officer acquires by virtue of a levy of process and seizure of property, is not divested by a replevin of the property from

¹ Lockwood v. Perry, 9 Met. 440.

² Hunt v. Robinson, 11 Cal. 262.

³ Cited and followed in *Rives v. Wilborne*, 6 Ala. 46.

⁴ Lockwood v. Perry, 9 Met. (Mass.) 440; *White v. Dolliver*, 113 Mass. 402.

him; he is so far regarded as the owner that the title which the first process conferred on him exists, notwithstanding the replevin. Should the property come again into his possession by the levy of another execution or attachment, the lien of the first process revives, and the effect of this is to discharge the securities.¹

§ 478. **The same. Illustrations of the rule.** Where an execution from the State Court was levied by the sheriff upon property which was afterwards claimed by a stranger to the writ, and he gave bond to try the title, (a statutory proceeding similar in principle to a suit in replevin,) and the goods, while so in the claimant's possession, were levied upon by an execution from the United States Court, the Supreme Court of the United States held that the property, though in the possession of the claimant, was in the custody of the State Court, and that the levy of the marshal was erroneous; that while the property was in the possession of the claimant who had given bond, his custody was the custody of the court where his claim was pending; that the marshal had no more right to levy upon it than if it had been in the actual possession of the sheriff on execution from the State Court.² A New York case held that where goods seized upon execution were replevied from the sheriff by a third person, that the lien of the sheriff was gone; or rather, that the plaintiff in replevin took all the property which the sheriff had by his *fi. fa.*, and that the property could not again be taken by the officer on an execution against the defendant in the first execution.³ But nothing in this case appears to conflict seriously with the doctrine in *Hunt v. Robinson*, or *Hagan v. Lucas*, *supra*, or the case of *Burkle v. Luce*, 1 Comst. (N. Y.) 163, which are authority for saying that the right acquired by the plaintiff in replevin is only a temporary right; that when that right has ceased the sheriff may retake the property and sell it, thus

¹ *Hunt v. Robinson*, 11 Cal. 272. See and compare *Goodheart v. Bowen*, 2 Bradw. (Ill.) 578.

² *Hagan v. Lucas*, 10 Pet. (U. S.) 400. This principal is followed in *Goodheart v. Bowen*, 2 Bradw. (Ill.) 578.

Acker v. White, 25 Wend. (N. Y.) 614.

clearly recognizing the revival of the lien of the sheriff.¹ The doctrine in *Hagan v. Lucas*, *supra*, is clearly recognized in Alabama, where it is held that property taken upon a writ of replevin is in the custody of the law, and not subject to other process pending the suit.²

§ 479. **The same. Observations upon.** In attempting to draw a satisfactory conclusion from these cases the difficulty lies in the fact, that in the early cases the plaintiff in replevin was always regarded as the owner of the property. The writ did not lie to try title, but to enable a plaintiff whose goods had been wrongfully distrained to recover them. Of course, in all such cases, the owner then, as now, took his own property. The lien of the distrainer was gone.³ The owner might sell and convey a good title as though they had never been taken from him. A large majority of the cases, however, now are brought, not for the purpose of recovering a pledge wrongfully distrained, but for the purpose of testing ownership; this is the principal, if not the only question in dispute; and it does not by any means follow that the plaintiff who acquires possession of goods by means of his writ of replevin has any title to the property,⁴ and if he has no title he can convey none by sale. He is, however, invested with possession and the outward ensignia of ownership, has given bond to his opponent, which in contemplation of law is sufficient to indemnify the latter against loss, whatever may be the result of the litigation, or whatever may become of the subject of the contest. The plaintiff is also under obligation to return the property if he fails in his suit, in as good order as when taken upon his writ, or to pay its value in case of failure to do so; with these responsibilities he has the right to use all reasonable means to protect himself from loss.⁵

§ 480. **The same.** It would, therefore, seem that in cases

¹ See *M'Rae v. M'Lean*, 3 Porter, (Ala.) 138; *Evans v. King*, 7 Mo. 411; *Lockwood v. Perry*, 9 Met. 444.

² *Rives v. Wilborne*, 6 Ala. 45.

³ *Speer v. Skinner*, 35 Ill. 290; *Woglam v. Cowperthwaite*, 2 Dall. 68; *Acker v. White*, 25 Wend. 614; *Bradyll v. Ball*, Bro. Ch. Ca. 427.

⁴ *Lovett v. Burkhardt*, 44 Pa. St. 174.

⁵ *Gordon v. Jenney*, 16 Mass. 469.

where the property is of a nature such as will be likely to perish or seriously diminish in value within the time which will probably be required for proper litigation, the plaintiff will be justified in selling, consuming or disposing of it. In case he does not do so the fact that the property has perished will not relieve him from his liability on the bond. So in cases where the property in dispute consists of merchandise valuable and useful only for purposes of sale, and is subject to constant fluctuations in value, or when it is valuable only for immediate consumption, the plaintiff will, without doubt, have the right to put it to the use for which it was properly and naturally adapted, even if it should involve its sale or consumption. When the property is valuable chiefly for use, and will not be likely to diminish in value by being kept until the litigation can be concluded, the plaintiff ought to be ready to restore it to the defendant, if such be the judgment of the court. While there seems to be no direct authority to sustain this doctrine, it is in entire harmony with the general rules of law governing such questions; and unless the particular case should render some other rule more apparently just, this will doubtless be the holding of the court.¹

¹ *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 117; *Gordon v. Jenney*, 16 Mass. 469. In Ohio the statute formerly made no provision for a return; the plaintiff obtaining possession by means of the writ, took all the title the defendant had. The bond was supposed to protect the defendant from loss. *Jennings v. Johnson*, 17 Ohio, 154; *Smith v. McGregor*, 10 Ohio St. 470. This rule, however, is now changed by statute.

CHAPTER XVI.

THE RETURN.

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§ 481. *The return. General principles.* As has been stated, both parties in replevin are called actors or plaintiffs.¹ When

¹ *Ante*, § 21.

the action was for a distress, the defendant, by avowing and demanding a return, was looked upon as suing for the right to make the distress. In other cases, where he claimed the property and demanded a return, his claim was regarded as a kind of cross-action for the recovery of the property. Upon the decision of this question depended the possession of the property. It is therefore one of the most important arising in this proceeding.

§ 482. **The same. Return must be claimed.** The issue as to whether a return shall be made is not always presented in the pleading; but where it is, the action is not determined until the final judgment of the court upon it.¹ And to enable the court to determine the respective rights of parties, the plaintiff is not allowed to dismiss his suit, so as to prevent a hearing or a decision as to the propriety of a return, or as to the value of the property, or as to an assessment of damages.² When the plaintiff does so dismiss his suit, the defendant may retain it or have it reinstated for the purpose of having these issues determined. In such case the plaintiff is regarded as in default.³

§ 483. **Plaintiff not liable for, unless so ordered by the court.** Whatever judgment the court may render, whether against the plaintiff, for costs, or costs and damages, he is under no obligation to return the goods delivered to him upon the writ,

¹ *Broom v. Fox*, 2 Yeates, (Pa.) 530; *Branch v. Branch*, 5 Fla. 447; *City of Bath v. Miller*, 53 Me. 316.

² *Berghoff v. Heckwoll*, 26 Mo. 512; *Raney, Admr., v. Thomas*, 45 Mo. 112; *Collins v. Hough*, 26 Mo. 150; *Broom v. Fox*, 2 Yeates, (Pa.) 530; *Waldman v. Broder*, 10 Cal. 379; *Studdert v. Hassell*, 6 Humph. (Tenn.) 137; *Mikesill v. Chaney*, 6 Port. (Ind.) 52; *Noble v. Epperly*, 6 Port. (Ind.) 415; *Hall v. Smith*, 10 Iowa, 45.

³ *Wilkins v. Treynor*, 14 Iowa, 393; *Kimmel v. Kint*, 2 Watts. (Pa.) 432. But, see *Wiseman v. Lynn*, 39 Ind. 254, where it is said, if the suit be dismissed before hearing, there can be no judgment for return. The bond, however, would be liable. See, also, *Sanderson v. Lace*, 1 Chand. (Wis.) 231. In Alabama, when the plaintiff consented to a nonsuit, the court said the remedy was upon the bond, it having no data from which to render judgment beyond the formal one for costs. *Savage v. Gunter*, 32 Ala. 469. If the suit be dismissed, the order for a return must be made at the same term; otherwise the court cannot, at a subsequent term, change its records and order a return to the defendant. *Lill v. Stookey*, 72 Ill. 495.

unless such be the order of the court.¹ But it does not follow that the plaintiff may not in some cases find it to his advantage to return them without the order of the court; as, for instance, the order for a return may not have been made, although the plaintiff has failed in his action, *i. e.*, has not prosecuted it with success, thus rendering him liable to an action upon the bond. In such case, unless the plaintiff is able to make good his defense to suit upon the bond, it may sometimes be advisable to restore the property, even though he at once replevy it again, as the restoration of the property, and its acceptance by the defendant, would go in mitigation of damages in suit upon the bond.

§ 484. **Duty of plaintiff when return is adjudged.** If the court renders judgment for a return, the duty is imposed upon the plaintiff to at once return the goods. This duty is not the passive one of permitting the defendant to take his goods, or to surrender them to the sheriff upon the writ of *retorno*, but he is required to redeliver them to the defendant,² and in as good order as when taken.³

§ 485. **Return ordered only where it appears just.** The power to order a return is exercised upon the idea that a wrongful taking of the goods from the defendant, even though under the authority of legal process, does not deprive the owner of his title or right of possession.⁴ This power is always exercised by the court in the furtherance of justice, and to protect the rights of the parties;⁵ otherwise, property might be taken,

¹ Clark v. Norton, 6 Minn. 415; Ladd v. Prentice, 14 Conn. 117; Way v. Barnard, 36 Vt. 366.

² Parker v. Simmonds, 8 Met. 207.

³ Berry v. Hoeffner, 56 Me. 171; Washington Ice Co. v. Webster, 62 Me. 363; Allen v. Fox, 51 N. Y. 562. The writ of return cannot issue except to the sheriff of the county where judgment is rendered. Rathbun v. Ranney, 14 Mich. 382. The plaintiff cannot complain of the omission to award a return. If the jury find for the defendant, and a return is erroneously omitted, he is the only party injured, and he alone can complain. Branch v. Wiseman, 51 Ind. 1.

⁴ See dissenting opinion of SUTLIFF, J., in Smith v. McGregor, 10 Ohio St. 470; Kerley v. Hume, 3 T. B. Mon. (Ky.) 181.

⁵ Fowler v. Hoffman, 31 Mich. 221; Bartlett v. Kidder, 14 Gray, 450; Salkold v. Skelton, Cro. Jac. 519; Plant v. Crane, 7 Port. (Ind.) 486; Saffell

without any process to restore it,¹ or the plaintiff might be required to deliver his goods to the defendant, when the defendant really had no title or right to possess them, when such delivery would, in fact, amount to a loss of his goods. Another suit in replevin might be permitted on antecedent title, but a right to another suit is but a meagre award to a suitor in the right. Even after a general verdict for defendant, or a judgment that the writ be abated, the order for return does not follow as a matter of course. Whether it be rendered or not involves an inquiry into and a decision upon the merits. It is rendered by the court only as the rights of the parties require.² Where the verdict is for defendant for a sum of money, such a finding does not entitle him to a judgment for return. All that can be inferred is, that the plaintiff is entitled to the property on paying the sum awarded.³ When it appears that the defendant never had a right to the possession, a return will not be awarded. It would be absurd that one should acquire rights by successfully defending a suit, upon the ground that he has no interest in the matter in dispute.⁴

§ 486. **Return may be adjudged to one of several defendants.** Where there are several defendants, the court may adjudge a return to one of them, and refuse it to the others, or the judg-

v. Wash, 4 B. Mon. (Ky.) 92; *City of Bath v. Miller*, 53 Me. 317; *Wheeler v. Train*, 4 Pick. 168.

¹ *Mikesill v. Chaney*, 6 Port. (Ind.) 52; *Lowe v. Brigham*, 3 Allen, (Mass.) 430.

² *Tuck v. Moses*, 58 Me. 474; *Whitwell v. Wells*, 24 Pick. 33; *Lowe v. Brigham*, 3 Allen, 430; *Goodheart v. Bowen*, 2 Bradw. (Ill.) 578; *Bourk v. Riggs*, 38 Ill. 320; *Smith v. Aurand*, 10 S. & R. (Pa.) 92; *Saffell v. Wash*, 4 B. Mon. 92.

³ *Hunt v. Bennett*, 4 G. Greene, (Iowa,) 512. See *Hanford v. Obrecht*, 38 Ill. 493; *Hanford v. Obrecht*, 49 Ill. 146. Judgment may be simply for costs. *Wheeler v. Train*, 4 Pick. 168; *Ingraham v. Martin*, 15 Me. 373; *Miller v. Moses*, 56 Me. 128.

⁴ *Hall v. White*, 106 Mass. 600; *Whitwell v. Wells*, 24 Pick. 33; *Snelgar v. Hewston*, Cro. Jac. 611. Goods cannot be returned to a person from whom they were never taken. *Richardson v. Reed*, 4 Gray, 441. "When plaintiff is *non-suited* because the defendant never had possession, the defendant is not entitled to return a judgment for value." *Gallagher v. Bishop*, 15 Wis. 277.

ment may be in favor of all;¹ or the court may award part of the property to one of the defendants, and part to another, or to the plaintiff, as the rights of the parties shall appear.

§ 487. **Adjudged only when the defendant claims it.** Without repeating what has been said elsewhere, and without discussing the question of pleadings, the reader will understand that a return cannot be awarded unless the pleadings are framed for that purpose. The defendant must set up some affirmative right upon his part to have the goods delivered to him, or a return will not be adjudged. Thus, if the defendant sets up as his only defense that he did not take the goods, this virtually admits the plaintiff's right to them, and upon a verdict for defendant in such case a return will not be awarded.² The prayer for a return is in the nature of a cross action, in which the defendant is suing for a return of the goods and for damages.³ The same principles govern the plea of *non detinet*, which puts in issue only the detention; upon such plea no return will be awarded.⁴

§ 488. **The same. Exceptions to the rule.** In Indiana it is held that an officer who files general denial only, may prove property in himself as an officer by showing that he holds the property under the levy of process, and that the property is

¹ *Woodburn v. Chamberlain*, 17 Barb. 446; *Wells v. Johnson*, 16 Barb. 375.

² *Chambers v. Waters*, 7 Cal. 390; *Trotter v. Taylor*, 5 Blackf. 431; *Wright v. Mathews*, 2 Blackf. 187; *Douglass v. Garrett*, 5 Wis. 88; *Moulton v. Bird*, 31 Me. 297; *Ely v. Ehle*, 3 Comst. (N. Y.) 510; *Simpson v. M'Farland*, 18 Pick. 427; *Powell v. Hinsdale*, 5 Mass. 343; *Seymour v. Billings*, 12 Wend. 286; *Pratt v. Tucker*, 67 Ill. 346; *Bourk v. Riggs*, 38 Ill. 321; *Mills v. Gleason*, 21 Cal. 274; *Anstice v. Holmes*, 3 Denio, 244; *Harrison v. M'Intosh*, 1 Johns. 380; *Rogers v. Arnold*, 12 Wend. 30; *Prosser v. Woodward*, 21 Wend. 205; *Coits v. Waples*, 1 Minn. 134; *Finley v. Quirk*, 9 Minn. 194; *Cooper v. Brown*, 7 Dana, (Ky.) 333.

³ *Gould v. Scannell*, 13 Cal. 430; *Bonner v. Coleman*, 3 B. Mon. (Ky.) 464; *Smith v. Snyder*, 15 Wend. 324; *Berghoff v. Heckwolf*, 26 Mo. 512; *Brown v. Stanford*, 22 Ark. 78. But, see *Matlock v. Straughn*, 21 Ind. 128; *Kerley v. Hume*, 3 T. B. Mon. (Ky.) 181.

⁴ See pleading *non cepit* and *non detinet*. *Bemus v. Beekman*, 3 Wend. 667; *Smith v. Snyder*, 15 Wend. 324; *Pierce v. Van Dyke*, 6 Hill, 613; *Vose v. Hart*, 12 Ill. 378; *Conner v. Comstock*, 17 Ind. 92; *Hanfords v. Obrecht*, 38 Ill. 493.

owned by the defendant therein. This rule will probably be followed in States having a similar code of practice.¹ By statutory provisions in some of the States the plea of *non cepit* or *non detinet* puts in issue not only the taking and detention, but the right of property. In such case a verdict for the defendant ought to entitle him to a judgment for return.²

§ 489. **Formal prayer for return not essential.** A simple claim for a return in the answer is not sufficient. It should state facts as to the ownership, or right of possession, which justify an award of return.³ But a formal prayer for return is not essential. The averment of title by the defendant, or a plea setting up ownership in a third person averring a right of possession, with a formal traverse of the plaintiff's rights, will be sufficient.⁴ When the pleas were: 1st, *non cepit*; 2d, *non detinet*; 3d, goods not the property of the plaintiff; 4th, property in the defendant; 5th, property in a third person; and where the verdict was, "We find the issues for the defendant," this was equivalent to finding all the issues for the defendant, and a return was properly awarded.⁵ When the pleas were: *non cepit*, plea of property in defendant, and in a third person; the verdict was, "Not guilty;" this was regarded as not responsive to any plea except *non cepit*; *held*, a return could not be awarded.⁶

§ 490. **The same. In justice court.** In an appeal from a justice court where the pleadings were oral, and where the jury found this verdict: "We, the jury, find the defendant guilty," it was held equivalent to a finding of property in the plaintiff.⁷

§ 491. **Judgment for value rendered only where a return would be proper.** When the property itself cannot be had,

¹ *Branch v. Wiseman*, 51 Ind. 1.

² *Ford v. Ford*, 3 Wis. 399; *Sparks v. Heritage*, 45 Ind. 66; *Noble v. Epperly*, 6 Ind. 414.

³ *Lewis v. Buck*, 7 Minn. 105.

⁴ *King v. Ramsay*, 13 Ill. 623; *Underwood v. White*, 45 Ill. 438; *Chandler v. Lincoln*, 52 Ill. 76.

⁵ *Underwood v. White*, 45 Ill. 438.

⁶ *Hanford v. Obrecht*, 38 Ill. 493.

⁷ *Jarrard v. Harper*, 42 Ill. 457.

judgment for the value of the property is sometimes awarded. In such case, the judgment for value is never rendered to a defendant unless he show himself entitled to a return. Unless by his pleadings he has claimed the property, and asked a return, judgment for value would be erroneous.¹

§ 492. **When the defendant pleads property in a third person.** The defendant in this action may, and frequently does, plead property in himself, and also in a third person, traversing the plaintiff's right. If the goods, in such case, belong to a third person, the plaintiff being unable to show title in himself, must fail. When the defendant succeeds upon the plea of property in himself, he is entitled to have the property restored to him; the judgment is *pro retorno habendo*.² But when he succeeds upon his plea of property in a third person, it is sometimes a question whether he has a right to have the property returned, without in some way connecting himself with the rights of that person. There are cases upon both sides of this question. A very large number hold that the defendant who is successful upon such a plea is entitled to a return of the property without in any way connecting himself with the title of such third person,³ the theory being that the defendant, from whom the goods were wrongfully taken, ought, in justice, to be put in as good condition as he was before the taking.⁴

¹ Gould v. Scannell, 13 Cal. 430. See Bemus v. Beekman, 3 Wend. 667; Bourk v. Riggs, 38 Ill. 320; Vose v. Hart, 12 Ill. 378; Johnson v. Howe, 2 Gilm. 342; Mills v. Gleason, 21 Cal. 280.

² Landers v. George, 40 Ind. 160; Easton v. Worthington, 5 S. & R. (Pa.) 132; Walpole v. Smith, 4 Blackf. 305; Constantine v. Foster, 57 Ill. 38; King v. Ramsay, 13 Ill. 619; Underwood v. White, 45 Ill. 438; Quincy v. Hall, 1 Pick. 357; Waldman v. Broder, 10 Cal. 379.

³ Ingraham v. Hammond, 1 Hill, (N. Y.) 353, citing many cases; Prosser v. Woodward, 21 Wend. 209; Morss v. Stone, 5 Barb. 516; Anderson v. Talcott, 1 Gilm. 371; Quincy v. Hall, 1 Pick. 357; Hunt v. Chambers, 1 Zab. 627; Johnson v. Carnley, 6 Seld. (N. Y.) 576; Rickner v. Dixon, 2 G. Greene, (Iowa,) 592; Hopkins v. Shrole, 1 Bos. & P. 382; Butcher v. Porter, 1 Salk. 94; Anon. 6 Mod. 103; Allen v. Darby, 1 Show. 97; Hoeffner v. Stratton, 57 Me. 360. See Tuley v. Mauzey, 4 B. Mon. (Ky.) 5.

⁴ Butcher v. Porter, Carth. 242; Same v. Same, Show. 400; Salkold v. Skelton, Cro. Jac. 519; Harrison v. M'Intosh, 1 Johns. 384.

§ 493. **The same.** But a large number of cases hold that return will not be awarded to the defendant upon a plea of property in a stranger, unless he show he is in some way responsible to such stranger, or in some way connect himself with the title of the property.¹ A proper deduction from these conflicting cases seem to be, that when the defendant is a mere trespasser he cannot set up title in a third person to defeat the right of a plaintiff. The title in such third person which is necessary to defeat a plaintiff showing right to possession must be something that goes to destroy the plaintiff's right to recover, or such as would defeat an action of trespass if brought in place of replevin;² and this unquestionably was the law at a very early time.³

§ 494. **Judgment for return does not settle the question of title.** The action of replevin is frequently brought to try the question of the right to possession only, and in such cases a verdict and judgment are not evidence of title in the successful party. But when the title is in issue, and that question heard and determined, the judgment, of course, is conclusive on the parties, and all claiming under them.⁴ The judgment for a return, therefore, does not settle the question of ownership, unless that question was presented and tried. When, therefore, the action is dismissed, or where, for any cause, except a decision upon the merits, a judgment for return is rendered, the plaintiff may return the goods, and may replevy again on his original title.⁵ The statute of Marlbridge, which prevented such replevins, except upon a writ of second deliverance, is local to Great Britain, and does not apply in this country.⁶

¹ *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Duncan v. Spear*, 11 Wend. 54; *Brown v. Webster*, 4 N. H. 500; *Wilkerson v. McDougal*, 48 Ala. 518; *Rogers v. Arnold*, 12 Wend. 30.

² See *Van Namee v. Bradley*, 69 Ill. 300, a leading case on this subject.

³ *Butcher v. Porter*, 1 Salk. 93; Bro. Abr. title *Retorno Av.*, etc., 28; *Mitchell v. Alestree*, Vent. 249; Rast. Ent. 554.

⁴ *Seldner v. Smith*, 40 Md. 603; *Wallace v. Clark*, 7 Blackf. 299.

⁵ *Walbridge v. Shaw*, 7 Cush. 560; *Warner v. Matthews*, 18 Ill. 83; *Child v. Child*, 13 Wis. 20.

⁶ *Daggett v. Robins*, 2 Blackf. 417.

§ 495. Such judgment generally follows a verdict for the defendant. The principles of the common law incline to favor a return in all cases when the plaintiff has obtained delivery of the goods upon his writ, and for any cause failed to prosecute his suit to a successful issue; and these principle obtain generally in all the States.¹ This was on the presumption that when the plaintiff failed in his suit, the defendant was entitled to have the distress. The rule in this country may be stated, that when the plaintiff fails in his suit, the presumption is that the goods belong to the defendant, and ought to be returned to him. But the plaintiff may show cause, (if he is able,) why the return should not be made; and unless such cause be shown, the order for return usually follows, as a matter of course, the burden of proof being upon the plaintiff.² Even the insolvency of the defendant, occurring after suit brought, does not prevent him from having an order for a return. The fact that the title he once had has passed to his assignee cannot be set up by any other person to defeat his rights.³ In Ohio, formerly, the defendant was never entitled to a return; but if successful, was entitled to judgment for the value. The writ of return was unknown to the laws in that State, the bond

¹ When the defendant claims property, and plaintiff takes a *non-suit*, return will be awarded. Stat. Westm. 2 C. 2; *Timp v. Dockham*, 32 Wis. 153. When a party brings replevin in a State court to recover property seized from him on execution from a federal court, the replevin should be dismissed, and an order given for a return of the goods. *Booth v. Ableman*, 16 Wis. 460; *Freeman v. Howe*, 24 How. (U. S.) 450; *Taylor v. Carryl*, 20 How. 584; *Peck v. Jenness*, 7 How. (U. S.) 612-621; *Lowe v. Brigham*, 3 Allen, 429.

² *Barry v. O'Brien*, 103 Mass. 521; *Anderson v. O'Laughlin*, 1 Blake, (Mont.) 81; *Dahler v. Steele*, 1 Blake, (Mont.) 290; *Salkold v. Skelton*, Cro. Jac. 519; *Presgrave v. Saunders*, 2 Ld. Raym. 984; *Clark v. Adair*, 3 Har. (Del.) 116; *Vernon v. Wyman*, 1 H. Bla. 24; *Mikesill v. Chaney*, 6 Port. (Ind.) 52; *Simpson v. McFarland*, 18 Pick. 431; *Mason v. Richards*, 12 Iowa, 73; *Chadwick v. Miller*, 6 Iowa, 38; *Jansen v. Effey*, 10 Iowa, 227; *Quincy v. Hall*, 1 Pick. 357; *Timp v. Dockham*, 32 Wis. 154; *Dawson v. Wetherbee*, 2 Allen, 462; *Wheeler v. Train*, 4 Pick. 168; *Allen v. Darby*, 1 Show. 97; *Smith v. Aurand*, 10 S. & R. (Pa.) 92; *Phillips v. Harriss*, 3 J. J. Marsh. 122; 1 Ch. Plea. 162; *Fleet v. Lockwood*, 17 Conn. 233.

³ *Hallett v. Fowler*, 10 Allen, 37; *Hallett v. Fowler*, 8 Allen, 93.

being supposed to represent the property, which was regarded as transferred by the writ.¹

§ 496. **The rights of the parties at the time the return is asked, will govern.** Replevin differs somewhat from other actions, in this, that the court will inquire into the conditions of the title to the property, after the suit was begun, down to the time the judgment for possession is asked. This does not change the rule that the facts existing at the time the suit was begun govern the rights of the parties at the trial;² but when the property remains to be disposed of, the court will inquire into the state of facts existing at the time the order for a return is asked. If it appears that a change in ownership or right of possession has occurred since the beginning of the suit, as by the expiration of a lease, or the termination of some limited interest, so that the property or right of possession vests in the defendant, a return will not be awarded, notwithstanding the title, as it stood at the commencement of the suit, might have been otherwise.³ As to whether a return will be ordered where the plaintiff fails to prove a demand for the goods before bringing suit, and for that reason judgment is against him, is discussed under the head of demand to which the reader is referred.⁴

§ 497. **The same. Illustration of the rule.** Where the defendant was successful, and moved for a return of the property, the plaintiff objected, upon the ground that since the commencement of the suit the defendant's title had expired, it appeared that the facts which the plaintiff relied upon to sustain his objection were known to him at the time of the

¹ *Smith v. McGregor*, 10 Ohio St. 470; *Williams v. West*, 2 Ohio St. 87. The statute, however, has changed this. As to the rule in Pennsylvania, see *Gibbs v. Bartlett*, 2 W. & S. 34. And in Alabama, see *Savage v. Gunter*, 32 Ala. 469.

² *Johnson v. Neale*, 6 Allen, (Mass.) 229.

³ *Ingraham v. Martin*, 15 Me. 373; *Davis v. Harding*, 3 Allen, 303; *Martin v. Bayley*, 1 Allen, 382; *Whitwell v. Wells*, 24 Pick. 33; *Walpole v. Smith*, 4 Blackf. 306; *Dawson v. Wetherbee*, 2 Allen, 461; *Simpson v. McFarland*, 18 Pick. 430; *Collins v. Evans*, 15 Pick. 63.

⁴ See § 372, *et seq.*

trial of the replevin suit, the court said it was too late to interpose them for the purpose of defeating a return.¹

§ 498. **The same.** The technical correctness of this ruling will not be questioned. The rule is very clear that if at the time the judgment for return is asked, the property has become vested in the plaintiff, even though the defendant had a right to the possession when the suit was begun, and though he have a verdict and judgment in his favor for costs, he cannot have a return.² When plaintiff had leased the property, and the lease had not expired when the suit was begun, but had expired at the time of the trial, the successful defendant was entitled to costs, but not to a return, as the title at the time the return was asked was in the plaintiff.³

§ 499. **Never ordered unless it appears that the plaintiff obtained deliverance upon the writ.** A return can never be adjudged unless it appear that the plaintiff has obtained deliverance of the property by virtue of his writ. In States where the defendant is permitted by statute to retain possession of the goods upon giving bond, a return does not follow as a matter of course upon a finding of the issues in his favor as to ownership or possession; such a verdict is no evidence that the goods were delivered to the plaintiff. The presumption would be that they remained with the defendant; judgment upon these issues, therefore, should not include a return until it be shown that the plaintiff obtained deliverance of the goods upon his writ.⁴ So, when the judgment was for a return of property described in the writ, and it appeared from the officer's return that all the property was not taken and delivered to the plaintiff upon the writ, the court reversed the judgment, saying plaintiff could not be required to return more than came into his possession upon the writ, and its increase.⁵

¹ *McNeal v. Leonard*, 3 Allen, (Mass.) 268.

² *Simpson v. McFarland*, 18 Pick. 431; *O'Connor v. Blake*, 29 Cal. 313; *Wheeler v. Train*, 4 Pick. 168.

³ *Collins v. Evans*, 15 Pick. 65; *Allen v. Darby*, 1 Show. 99.

⁴ *Schofield v. Ferrers*, 46 Pa. St. 439; *Nickerson v. Chatterton*, 7 Cal. 570; *Brown v. Stanford*, 22 Ark. 78; *McKeal v. Freeman*, 25 Ind. 151; *McGinnis v. Hart*, 6 Clark, (Iowa,) 210; *Conner v. Comstock*, 17 Ind. 90.

⁵ *Mattingly v. Crowley*, 42 Ill. 300.

§ 500. **Return of the young of animals born after suit begun.** Where the property in dispute is living animals, the increase of such animals, born after delivery to the plaintiff, may be ordered to be returned;¹ but wool shorn from sheep, or butter made from the milk of cows, would be compensated for in damages, not ordered to be returned.² But the children of a slave might be recovered with the mother; the ownership of the mother carries with it the ownership of her children.³

§ 501. **Where defendant avoids trial upon the merits.** When the defendant has an opportunity to contest the plaintiff's claim upon the merits, and avoids doing so by technical objections which are sustained, for purely technical reasons, the judgment for a return does not necessarily follow.⁴ If the writ abate for the mistake of the clerk, the defendant shall not have return.⁵ When the defendant pleads in abatement for a variance between the writ and the declaration, and is successful, no return shall be awarded. If he is justly entitled to a return, he should plead and claim it; but when he avoids the issue upon the merits, and no fact appearing in the pleadings or the record showing his right to possession, a return will not be ordered.⁶ But the plea may show that the defendant is entitled to a return; if so, it will be allowed.⁷ So, where the action is defeated only because it is prematurely brought, there is authority for withholding the order for a return, though defendant be entitled to costs and damages.⁸

§ 502. **The same.** Although these cases by no means stand alone, they cannot be said to represent the current of authorities. When the defendant pleaded in abatement for

¹ *Buckley v. Buckley*, 12 Nev. 423; *Jordan v. Thomas*, 31 Miss. 558.

² *Buckley v. Buckley*, 12 Nev. 423.

³ *Seay v. Bacon*, 4 Sneed. (Tenn.) 103.

⁴ *McIlvain's Admr. v. Holland*, 5 Har. (Del.) 228.

⁵ *Gilbert on Replevin*, 175; *Gould v. Barnard*, 3 Mass. 199, 2 Inst. 340. See *Parker v. Mellor*, Carth. 398; *Allen v. Darby*, 1 Show. 99; *Patter v. North*, 1 Wm. Saund. 347; *Cross v. Bilson*, 6 Mod. 102.

⁶ *Hartgraves v. Duval*, 1 Eng. (Ark.) 508; *Dickinson v. Noland*, 2 Eng. (Ark.) 26; *Hill v. Bloomer*, 1 Pinney, (Wis.) 463; *Simpson v. McFarland*, 18 Pick. 430; *Gould v. Barnard*, 3 Mass. 199.

⁷ *People ex rel., etc. v. N. Y. Com. Plea*, 2 Wend. 644.

⁸ *Martin v. Bayley*, 1 Allen, (Mass.) 381.

want of a bond for costs (the plaintiff being a non-resident of the State), and the plea was sustained, a return of the property was adjudged.¹ So, in Maine, when the writ was abated because of a defect in the bond, the defendant had judgment for a return.² The same rule was announced in a well-considered case in Vermont, where the suit was brought in a county other than that in which the goods were detained. The court dismissed the case, but ordered a return of the goods to the defendant.³ Where the plaintiff is defeated because of defect in his suit or proceeding, while the court will usually order a return of the property, the judgment is not conclusive as to title; that has not been tried, and the plaintiff may, if he elect, bring another suit for the same property, to determine that question.⁴

§ 503. **The general rule stated.** It is more probable, however, that the cases cited for and against the return for technical errors upon the part of the plaintiff, do not present the real principle which lies at the bottom of all such cases, which is, that the court will, in all cases where a return is demanded, rather favor an investigation of the right of the respective parties, at the time, and award or withhold the judgment for a return, as from such investigation seems proper. Such a course is much better calculated to do justice between the litigants than an arbitrary penalty inflicted upon the defendant for asserting and standing upon a legal right, or a substantial reward to a plaintiff who has at least been guilty of a technical error.⁵

§ 504. **The same.** When it appeared upon the trial that the plaintiff in replevin had but a limited interest in the goods, and that the defendant was the real owner, the question of return depended upon the nature of the interest shown by each party. Replevin of goods attached by defendant as dep-

¹ *Fleet v. Lockwood*, 17 Conn. 233.

² *Greely v. Currier*, 39 Me. 516; *McArthur v. Lane*, 15 Me. 245.

³ *Collamer v. Page*, 35 Vt. 387.

⁴ *Collamer v. Page*, 35 Vt. 393; *Thurber v. Richmond*, 46 Vt. 398.

⁵ *Walbridge v. Shaw*, 7 Cush. 561; *Whitwell v. Wells*, 24 Pick. 33. When the right of property and possession are put in issue, but not passed upon, a return cannot be awarded. *Heeron v. Beckwith*, 1 Wis. 18.

uty sheriff, etc.; trial; verdict for defendant, who moved for a return. Plaintiff offered to show that since the verdict the attachment had been dissolved, and that defendant's interest had ceased. On appeal DEWEY, J., said the attaching officer may be liable to the debtor; the dissolution of the attachment may have been the effect of proceedings in insolvency, and the officer may be liable to the assignee. A return should be awarded.¹

§ 505. **Liquors sold to enable vendee to violate the law.** Where parties sold liquors to enable their vendee to sell them in violation of the law, the vendors could not sustain replevin; having brought their suit against the sheriff who had attached them as the property of the vendee, they could not claim that they should, on dismissal of their suit, be left with them. The law found them in the hands of the sheriff, and whether they were properly or not subject to sale or process in the sheriff's hands, they were to be returned to him.

§ 506. **When the parties are joint tenants.** When the property belonged to the plaintiff and defendant as co-tenants, and the jury so found, the action, of course, could not be sustained; in such case the defendant was entitled to judgment for a return; otherwise, the plaintiff, though not entitled to sue his co-tenant in this action, would derive the same benefit from his suit as if he had rightfully brought the action;² but damages, in case the property be not returned, can only be for the interest which the defendant has in it.³

§ 507. **Where the property is lost or destroyed.** When it appears that the property is hopelessly lost or destroyed, so that a judgment for its return can be of no avail, a failure to render judgment for the return will be at most a technical error, and for which the judgment for value will not be reversed.⁴ When property taken is a living animal, and it dies before return, it is a good plea to say it is dead without

¹ Dawson v. Wetherbee, 2 Allen, 461; Kimball v. Thompson, 4 Cush. 441; Johnson v. Neale, 6 Allen, 228.

² Mason v. Sumner, 22 Md. 312.

³ Jones v. Lowell, 35 Me. 539; Witham v. Witham, 57 Me. 448; Bartlett v. Kidder, 14 Gray. 450.

⁴ Brown v. Johnson, 45 Cal. 77; Boley v. Griswold, 20 Wall. 486.

fault of defendant;¹ and in such cases the court may render judgment for the value without ordering a return.

§ 508. **When the question of return should be determined.** The right to a return should be determined in the replevin suit.² In Missouri, upon a judgment of non-suit against the plaintiff, a writ of inquiry issues to ascertain the value of the property; also, whether the plaintiff has possession or not, and to assess the damages for the taking and detention.³ The judgment for return must be rendered at the term at which the case is determined. If the fact that the court has at the time of disposing of the suit decided to award a return, but does not do so, does not authorize the entry of such judgment at a subsequent term.⁴ The rules before stated, while they apply generally in practice, have a peculiar application in replevin where the action is in the nature of a tort, and where promptness and exactness are especially required.

§ 509. **Return or delivery in States adopting the code.** By legislative changes in many of the States this action has become simply one of "claim and delivery." The plaintiff claims the property, but frequently does not ask delivery until after trial. The judgment at the conclusion of the suit awards property to the party entitled to its possession; if it be to the defendant from whom the property has been taken, the judgment is for a return; if to the plaintiff who has not had delivery before the judgment, it is for a delivery. The judgments in such cases are controlled by very similar principles. The court, after due considerations of the rights of the parties, awards the property to the one entitled to it; if that party is not in possession, the court awards a delivery to him, and also a judgment for the value to be collected in case the order for delivery is not complied with. The judgment in such case is not absolute, but is in the alternative for the goods or for the

¹ *Carpenter v. Stevens*, 12 Wend. 589, though this is disputed; see *post*, § 600, *et seq.*

² *Harman v. Goodrich*, 1 Greene, (Iowa,) 25; *Mills v. Gleason*, 21 Cal. 274. Unless in case of non-suit. *Ginaca v. Atwood*, 8 Cal. 446.

³ *Hohenthal v. Watson*, 28 Mo. 360.

⁴ *Lill v. Stookey*, 72 Ill. 495.

value in case delivery cannot be had,¹ and in case delivery in compliance with such judgment is not made, execution issues against the party to collect the value.

§ 510. The writ of return must describe the goods. It was an old rule that the sheriff, upon a writ of *retorno*, is not obliged to deliver the goods unless they were "shown to him," or so clearly described in the writ that there can be no question about their identity.²

¹This rule is general, though in some States the party may elect to take judgment for the value alone.

²Rast. Ent. p. 570 *b*; Taylor v. Wells, 2 Saund. 74 *b*. It is a good return to say that "none came to show the beasts." Bac. Abr. title Rep. H; Wilson v. Gray, 8 Watts, (Pa.) 34. It is also held that if the goods are described in the writ of return as they were described in the writ, it is sufficient, and a rule that the sheriff must make inquiry, if he cannot find the goods without. These rules are not intended to encourage looseness in description, which should in all writs be full and accurate

CHAPTER XVII.

DAMAGES.

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§ 511. By common law, damages allowed to plaintiff, not to defendant. By the common law, the plaintiff in replevin, if successful, was entitled to damages; the defendant or avowant was not.¹ This was because the action would lie only in cases of distress for rent, where the lord distraining had no right to use the cattle,² and was not damaged³ by the replevin while the tenant was always damaged by the taking and consequent loss of the use of his beasts. The statutes 7 H. VIII. c. 4, and 21 H. VIII. c. 19, gave the defendant a right to damages, the same as the plaintiff was entitled to before the statute was enacted. The governing principle of these statutes has obtained the force of law generally in this country — in some States by direct adoption of the common law and the statutes in aid thereof, and in others the courts have adopted the substantial principles of these statutes to the requirements of more modern jurisprudence. The common law to prevent vexatious suits, required the plaintiff to find pledges to pros-

¹ Winnard v. Foster, Lutw. 374; Hopewell v. Price, 2 Har. & G. (Md.) 275.

² Anon. Dyer, 280.

³ The sheriff it seems has no right to use cattle seized. Briggs v. Gleason, 29 Vt. 80; Lamb v. Day, 8 Vt. 407.

ecute; and he was amerced if he failed to sustain his claim. As that practice fell into disuse, costs were awarded to the successful party, these not being sufficient in all cases to restrain frivolous or vexatious suits, the law gave the successful party damages.¹

§ 512. General rule now is that damages are awarded to the successful party. Under modern practice, the general rule may be stated, that the successful party in replevin is entitled to damages against his opponent in all cases where damages are claimed in his pleading. The amount may be nominal, or substantial, as circumstances require.² The question of damages is so far an essential one in replevin, that a failure to claim them in the declaration is a fatal defect.³ The successful party in this action may have judgment for the property, or for its value, in case it is not delivered. It is very evident that in many cases the restoration of the goods or the payment of the value falls far short of compensating for the injury plaintiff has sustained.⁴ In such cases damages are awarded to make good the loss.⁵

§ 513. Allowed only as an incident to the proceeding for possession. Replevin is not the proper action for the recovery

¹ *Savile v. Roberts*, 1 *Ld. Raymond*, 380.

² In *Kendall v. Fitts*, 2 *Foster*, (N. H.) 9, it was said, that in replevin damages should always be assessed for the plaintiff or defendant. In the subsequent case of *McKean v. Cutler*, 48 N. H. 372, it was said, that a finding of damages was not essential to the validity of a judgment in replevin. See, also, as to the general rule, *Brown v. Smith*, 1 N. H. 38; *Etter v. Edwards*, 4 *Watts*, (Pa.) 68; *Booth v. Ableman*, 20 *Wis.* 24; *Graves v. Sittig*, 5 *Wis.* 219; *Creighton v. Newton*, 5 *Neb.* 100; *School Dist. v. Shoemaker*, 5 *Neb.* 36; *Wright v. Williams*, 2 *Wend.* 636; *Buckley v. Buckley*, 12 *Nev.* 423; *Frey v. Drahos*, 7 *Neb.* 195; *Seymour v. Billings*, 12 *Wend.* 286; *Clark v. Keith*, 9 *Ohio*, 73; *Hohenthal v. Watson*, 28 *Mo.* 360; *Williams v. Phelps*, 16 *Wis.* 87. The jury should determine whether the plaintiff had the right of property, or the right of possession only, at the commencement of the suit, and if they find either in his favor, they should assess such damages as are proper. *Williams v. West*, 2 *Ohio St.* 86. Replevin sounds in damages like trespass. *Herdic v. Young*, 55 *Pa. St.* 1, 76.

³ *Faget v. Brayton*, 2 *Har. & J. (Md.)* 350; *Crosse v. Bilson*, 6 *Mod.* 102

⁴ See cases last cited.

⁵ *Stevens v. Tuite*, 104 *Mass.* 333; *Hemstead v. Colburn*, 5 *Cranch. C. C.* 655.

of damages, except as an incident to the proceeding for possession.¹ So when, after a demand and refusal, but before suit brought, the defendant offered to restore the property, the plaintiff on trial insisted that his right to damages was complete upon the refusal of the defendant to deliver; that a subsequent voluntary surrender would not defeat the action; the court held that surrender of the property was a bar to damages,² though perhaps the party might have been entitled to such damages as accrued after the refusal and before the surrender. When a distress was made of horses and cattle, and one horse and cow not levied upon followed the others to the place where they were impounded, although an effort was made to drive them back, and the next day the tenant was notified that he could get them by going for them, replevin would not lie; the defendant never had or claimed the possession. The only action which could be sustained would be an action for damages independent of the possession, and for that replevin is not adapted.³

§ 514. **May be allowed to both parties.** The verdict and judgment may sometimes be against both parties. That is, the plaintiff may have judgment for a portion of the property, while the remainder may be ordered to be returned to the defendant. In such cases each party is entitled to judgment against his opponent, for damages and costs, so far as he is successful.⁴ The general power of the court extends without doubt to set off the damages and costs one against the other, and to give judgment for the balance.⁵

¹ *Johnson v. Weedman*, 4 Scam. 495.

² *Savage v. Perkins*, 11 How. Pr. R. 17.

³ *Lindley v. Miller*, 67 Ill. 245. See, also, *Williams v. Archer*, 5 M. G. & S. 318; *Jansen v. Effey*, 10 Iowa, 227; *Whitfield v. Whitfield*, 40 Miss. 367; *Frazier v. Fredericks*, 24 N. J. L. 163; *Broadwater v. Darne*, 10 Mo. 278.

⁴ *Brown v. Smith*, 1 N. H. 36; *Williams v. Beede*, 15 N. H. 483; *Powell v. Hinsdale*, 5 Mass. 343; *Wright v. Mathews*, 2 Blackf. (Ind.) 187; *Clark v. Keith*, 9 Ohio, 73; *Seymour v. Billings*, 12 Wend. 286.

⁵ *McLarren v. Thompson*, 40 Me. 285; *Poor v. Woodburn*, 25 Vt. 239. There were six issues; the jury found three for each party; the court allowed each party all the costs upon the pleadings where he had succeeded, and judgment was accordingly. *Vollum v. Simpson*, 2 Bos. & Pull. 368. In this replevin differs from other actions. *Butcher v. Green*,

§ 515. **The reasons for the rule.** It must be kept in mind that in this action the plaintiff's suit is not only for his goods but for the damages he has sustained by reason of their wrongful taking or detention, which furnished the foundation of his action; and, if he succeeds in establishing his claim, he is entitled not only to his property, or its value, but to such damages as will be just.¹ The claim for damages is as much a part of the case as the contest for the possession of the goods,² but if the plaintiff, for any cause, fails or dismisses his suit, or submits to a non-suit, the defendant is entitled to a judgment for a return of the property, or for its value, and to such damages as shall compensate him for the injury he has sustained.³ The defendant is suing for a return of the goods and for damages,⁴ and if successful is entitled to judgment, and upon a proper showing to the same damages the plaintiff would have had had he been successful.⁵

§ 516. **Plaintiff cannot dismiss so as to avoid a hearing upon the question of damages or return.** The plaintiff cannot dismiss his suit so as to avoid a hearing as to the value of the property and assessment of damages. In case of a dismissal for that purpose, the court will retain the case and hear and determine the questions as to damages and a return;⁶ and if the plaintiff should dismiss his suit, it would not affect the defendant's right to an action on the bond.⁷

§ 517. **Where the suit is dismissed for informality.** It happens not unfrequently that the plaintiff is compelled to dismiss his suit for some informality in the proceeding, where no trial

Doug. (Eng.) 652; *Wright v. Williams*, 2 Wend. 633; *Porter v. Willet*, 14 Abb. Pra. Rep. 319.

¹ *Messer v. Baily*, 11 Foster, (N. H.) 9; *Bell v. Bartlett*, 7 N. H. 178; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402; *Graves v. Sittig*, 5 Wis. 223; *Parham v. Riley*, 4 Cold. (Tenn.) 10; *Gray v. Nations*, 1 Ark. 569.

² *Buckley v. Buckley*, 12 Nev. 430.

³ *Fallon v. Manning*, 35 Mo. 274; *Collins v. Hough*, 26 Mo. 149.

⁴ *Gould v. Scannel*, 13 Cal. 430; *Bonner v. Coleman*, 3 B. Mon. (Ky.) 464; *Smith v. Snyder*, 15 Wend. 324.

⁵ *Berghoff v. Heckwolf*, 26 Mo. 512; *Smith v. Winston*, 10 Mo. 299.

⁶ *Mikesill v. Chaney*, 6 Port. (Ind.) 52; *Ranney v. Thomas*, 45 Mo. 112; *Berghoff v. Heckwolf*, 26 Mo. 512.

⁷ *Hall v. Smith*, 10 Iowa, 45.

upon the merits can be had, but when the court is justified in ordering a return of the property. In such case, the question of assessing damages, in addition to the return of the property, is one of some difficulty. If, for example, the suit is dismissed for some informality in the affidavit, writ or bond, the judgment may be for a return; the defendant may also ask for an assessment of his damages for the wrongful taking. In such case no evidence of the plaintiff's title is permitted, when, in case an opportunity had been offered, he might have been abundantly able to show himself to be the owner of the goods, and entitled to their possession. The judgment for return in such case does not affect the question of title to the property, but the judgment for damages, if rendered, would be conclusive to that extent, and the plaintiff compelled to pay them without redress, although, according to the equities of the case, the property was his own, and wrongfully taken from him. Cases are not wanting which hold that where the defendant sets up some purely technical defense to defeat the plaintiff, and thus avoids a hearing upon the merits, no return will be awarded;¹ but the current of authority is doubtless the other way.²

§ 518. **The same.** In a well considered case in Vermont, the goods were ordered to be returned for informality in bringing the suit, without any investigation into the title, defendant insisting upon an assessment of damages. The court denied his application, saying, that the disputed questions of title were not determined, and that damages, (beyond nominal,) should not follow the plaintiff's failure to sustain his suit for mere irregularity.³ In Maine, after a judgment that the

¹ *Dickinson v. Noland*, 2 Eng. (Ark.) 26; *Hartgraves v. Duval*, 1 Eng. (Ark.) 506; *Hill v. Bloomer*, 1 Pinney, (Wis.) 463; *Gould v. Barnard*, 3 Mass. 199.

² *Crosse v. Bilson*, 6 Mod. 102; *Salkold v. Skelton*, Cro. Jac. 519; *Presgrave v. Saunders*, 2 Ld. Raym. 984; *Barry v. O'Brien*, 103 Mass. 521; *Dawson v. Wetherbee*, 2 Allen, (Mass.) 462; *Ranney v. Thomas*, 45 Mo. 112; *Wilkins v. Treynor*, 14 Iowa, 393; *Mason v. Richards*, 12 Iowa, 74; *Jansen v. Effey*, 10 Iowa, 227; *Fleet v. Lockwood*, 17 Conn. 233; *Gilbert on Replevin*, p. 169.

³ *Collomer v. Page*, 35 Vt. 396. See, also, *Thurber v. Richmond*, 46 Vt. 399.

writ abate, an order for a return was made; but the court refused to assess damages, upon the ground that there was no issue upon which they could be estimated.¹

§ 519. **The rule in such cases.** The true rule seems to be, that judgment for a return is only rendered when the court perceives such a course to be just; it will always hear evidence when a proper case is presented, as to whether the order for return should be made or not. At the same time it will consider all such facts as affect the question of damages; and if, from all the facts, it appears that the defendant has avoided a trial upon the merits, and that the plaintiff fails from a simple irregularity, when he otherwise would be likely to succeed, damages beyond nominal will very rarely, if ever, be awarded.²

§ 520. **The rule applicable to actions of tort generally apply to replevin; distinctions stated.** The rules for assessing damages in other cases, in the nature of tort, will generally be applicable to replevin. This distinction, however, exists, that in replevin the plaintiff asserts a continuing ownership in himself; he seeks a return of *his* goods, and damages for the interruption to *his* possession. In trover the plaintiff asserts that the defendant has converted the property to his own use; he therefore recognizes the transfer of the title to the defendant, and seeks simply a compensation for its value, not its return. It follows, that in trover the party can never recover for the use of the property, while it is equally clear that in replevin the successful party may, in many cases, be entitled to recover the value of the use of the property of which he has been wrongfully deprived.³ Again, in trover, the right of property, general or special, is always in question, while in replevin the right of possession may alone be in issue. This does not change the fact, however, that in their substantial features great similarity exists between all actions brought for the conversion of chattels.⁴

¹ *McArthur v. Lane*, 15 Maine, 245.

² *Pierce v. Van Dyke*, 6 Hill, (N. Y.) 613. See *ante*, Ch. —.

³ *McGavock v. Chamberlain*, 20 Ill. 220; *Allen v. Fox*, 51 N. Y. 564; *Williams v. Phelps*, 16 Wis. 87; *Scott v. Elliott*, 63 N. C. 216.

⁴ See *ante*, § 44, *et seq.*

§ 521. **Damages to plaintiff.** If the plaintiff prevails, the judgment is that the property belongs to him, that he rightfully took it by his writ, and that he is entitled to damages and costs, as well as judgment for the property.¹ Where the property was delivered to him upon the writ, his damages only include such sum as will compensate him for the injury he has sustained by reason of the wrongful taking or subsequent detention, together with any depreciation in value it may have suffered² up to the time when he obtained it by virtue of his writ, and not the value of the property. If the property was not delivered upon the writ, then its value, in addition to the damages for detention, may form a proper element of compensation.³

§ 522. **Damages to defendant.** Where the defendant makes claim to the property, and is successful, he is entitled to have it restored to him, or its value, with damages for the loss he has sustained by the interruption to his possession, estimated by substantially the same rules employed in estimating the plaintiff's damages. Damages to the defendant, however, are but an incident to the judgment for a return. If a return is adjudged, and the property has diminished in value while in plaintiff's possession, this decrease must be allowed to the defendant; otherwise, the plaintiff might return it in a depreciated condition. If it has increased in value, the increase must be allowed him, as the property is his, and he is entitled to the increase of his own property.⁴

§ 523. **The same.** Not allowed unless a return of the property is claimed. The order for a return is in the nature of a cross judgment. There must be some averment in the plead-

¹ *Moore v. Shenk*, 3 Barr. (Pa.) 13; *Stevens v. Tuite*, 104 Mass. 333; *Nicholas Ins. Co. v. Alexander*, 10 Humph. (Tenn.) 383; *Fisher v. Whoolery*, 25 Pa. St. 198.

² *Young v. Willett*, 8 Bosw. (N. Y.) 486.

³ *Ewing v. Blount*, 20 Ala. 694; *Russell v. Smith*, 14 Kan. 374; *Fisher v. Whoolery*, 25 Pa. St. 197; *Barkesdale v. Appleberry*, 23 Mo. 389; *Hohen-thal v. Watson*, 28 Mo. 360; *Suydam v. Jenkins*, 3 Sandf. 615; *Williams v. Archer*, 5 M. G. & S. (57 E. C. L.) 324.

⁴ *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 125; *Hooker v. Hammill*, 7 Neb. 231; *Allen v. Judson*, 71 N. Y. 76; *Pearce v. Twichell*, 41 Miss. 345; *Neis v. Gillen*, 27 Ark. 187; *Pierce v. Van Dyke*, 6 Hill, (N. Y.) 613.

ings to sustain it.¹ It follows that where the defendant by his pleading disclaims a judgment for a return, as he does by the plea of *non cepit* or *non detinet*, etc., without other pleas, he cannot have damages.²

§ 524. **The same. Exceptions.** It is provided by statute in some States that the plea of *non cepit* or *non detinet* shall put in issue the plaintiff's title as well as the wrongful taking or detention. In such cases the defendant may have a return upon the plea of *non cepit* or *non detinet*, and if he have judgment for a return he may also have judgment for damages. The pleader in such case, upon following the forms laid down in the local statute, must be regarded as asserting all the rights which are allowed to that form of plea.³

§ 525. **The rules for estimating damages.** The rules for estimating damages in this action are by no means as simple as they at first appear. Any general rule, however well it may be adapted to a particular case, cannot fail to work hardship in others. It is more important, says the court in *Hamer v. Hathaway*, 33 Cal. 117, that the rule should be certain, than that it should be entirely beyond question on principle. With this general doctrine of stability all must concur. It must be added, however, that correct principles can alone become certain. In this, as in other actions at law, the case is tried and determined upon the rights of the parties as they existed at the time the suit was begun, but damages may be, and most usually are, assessed up to the time of the rendition of judg-

¹ Gould v. Scannell, 13 Cal. 430; Bonner v. Coleman, 3 B. Mon. (Ky.) 464; Smith v. Snyder, 15 Wend. 324.

² The defendant is entitled to damages only when he shows by his pleading that he is entitled to a judgment for the goods. When by his pleading he admits the plaintiff's right to the goods, it would be absurd to award him damages, even though he have a verdict and judgment for costs. Hopkins v. Burney, 2 Fla. 44; Gould v. Scannell, 13 Cal. 430. See People v. Niagara C. P., 4 Wend. 217; Bates v. Buchanan, 2 Bush. (Ky.) 117; Bemus v. Beekman, 3 Wend. 668; Whitwell v. Wells, 24 Pick. 25; Douglass v. Garrett, 5 Wis. 85. "If the defendant never had possession he cannot have return, nor is he entitled to damage for the detention of goods he never had." Richardson v. Reed, 4 Gray, (Mass.) 443.

³ Pickens v. Oliver, 29 Ala. 528.

ment, the same as interest upon a note. Damages to the defendant must be so assessed.¹

§ 526. **Nominal damages.** The rule for estimating damages to the successful party in replevin is similar in principle to that in other cases when there has been an invasion of a right. Nominal damages at least are awarded without proof of actual injury. The general rule is, that when one does an act injurious to another's right, which may be evidence for the wrong-doer in the future, damages may be awarded, even if the evidence predominates that there has been no substantial injury.²

§ 527. **The same.** This rule is based upon the assumption that any interference with the party's possession, or right of possession, is an injury, even if unaccompanied by actual loss. Its observance is frequently of the utmost importance in settling questions of title.³

§ 528. **Party claiming damages must show the extent of his injuries by proof.** It is for the injured party to show by proof the nature and extent of the injury he has suffered. He can in no case recover more than nominal damages without proof of the extent of his loss.⁴ Simple proof that the defendant took the goods will not entitle the plaintiff to more than nominal damages.⁵ The same rule applies in trespass. A trespass

¹ *Washington Ice Co. v. Webster*, 62 Me. 341.

² *Mellor v. Spateman*, 1 Saund. n. 346 b; *Strong v. Keene*, 13 Irish L. R. 93; *Smith v. Houston*, 25 Ark. 184; *Cory v. Silcox*, 6 Ind. 39. Nominal damages have been called "a peg to hang costs on;" "A sum of money which has no quantity." MAULE, J., in *Beammont v. Greathead*, (2 M. G. & S.) 52 E. C. L. 498.

³ *Munroe v. Stickney*, 48 Me. 462; *Devendorf v. Wert*, 42 Barb. 227; *Stowell v. Lincoln*, 11 Gray, 434; *McConnell v. Kibbe*, 33 Ill. 175. Awarded when defendant had no title to property. *Champion v. Vincent*, 20 Texas, 811; *Smith v. Whiting*, 100 Mass. 122; *Allaire v. Whitney*, 1 Hill, 484; *Sedgwick on Meas. of Damages*, 6 Ed. p. 55, says: "The rule as to nominal damages should be limited to cases where a right is *necessarily litigated*." A rule of much importance, and which should be more generally enforced. There seems to be a strong tendency in the English courts to discourage suits for nominal damages when no others appear. *Williams v. Mostyn*, 4 Mees & W. 145; *Young v. Spencer*, 10 B. & C. (21 E. C. L.) 145.

⁴ *Mann v. Grove*, 4 Heisk. (Tenn.) 403.

⁵ *Phenix v. Clark*, 2 Mich. 327.

will not usually warrant substantial damages, unless some circumstances of aggravation or actual injury be shown.¹ The jury are never authorized to assess damages without proof of their extent,² unless it be in exceptional cases when facts are submitted to their consideration to estimate under the order of the court.³

§ 529. **The same.** The same rule applies when a return is adjudged to defendant. In the absence of proof of actual damages a judgment will simply be entered for a nominal amount.⁴ When the jury award damages for detention without finding the fact of detention, such award is erroneous.⁵ When the jury omit to find any damages, judgment therefor cannot be rendered.⁶

§ 530. **Compensation the object of the award.** The rule for ascertaining damages in replevin, when no fraud or malice is involved, is usually based upon the idea of compensation; the object being to restore the party, as far as pecuniary compensation will do so, to the condition he was in before the act complained of was committed.⁷

¹ *Rose v. Gallup*, 33 Conn. 338.

² *Phenix v. Clark*, 2 Gibbs, (Mich.) 327.

³ Plaintiff proved damages, but not the amount; a judgment for the defendant was held error. Under such proof plaintiff was entitled to nominal damages, at least. *Brown v. Emerson*, 18 Mo. 103.

⁴ *Seabury v. Ross*, 69 Ill. 533.

⁵ *Swain v. Roys*, 4 Wis. 150.

⁶ *Black v. Winterstein*, 6 Neb. 225.

⁷ *Berthold v. Fox*, 13 Minn. 504; *Bonesteel v. Orvis*, 22 Wis. 522; *Stevens v. McClure*, 56 Ind. 384; *Allen v. Fox*, 51 N. Y. 564; *Williams v. Crum*, 27 Ala. 468; *Dorsey v. Manlove*, 14 Cal. 553. Dicta in *Hotchkiss v. Jones*, 4 Porter, (Ind.) 260, where court affirmed judgment in a fictitious case without looking at record. *DeWitt v. Morris*, 13 Wend. 497; *Brizsee v. Maybee*, 21 Wend. 144; *Dows v. Rush*, 28 Barb. 157; *Dennis v. Barber*, 6 S. & R. (Pa.) 420; *Allison v. Chandler*, 11 Mich. 542; *Baker v. Drake*, 53 N. Y. 211; *Barnes v. Bartlett*, 15 Pick. 75; *Gillies v. Wofford*, 26 Tex. 66; *Wood v. Braynard*, 9 Pick. 322; *Woodburn v. Cogdal*, 39 Mo. 222. Such damages are equivalent for the injury. *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402. Enough to compensate party. *McCabe v. Morehead*, 1 Watts & S. (Pa.) 513. Exemplary damages may be given. *Taylor v. Morgan*, 3 Watts, 334. Damages which cannot be accurately measured should not for that reason be denied, but the amount should be left to the finding of the jury. *Gilbert v. Kennedy*, 22 Mich. 117. In the absence of the elements of fraud, malice, or

§ 531. **How the amount of compensation is ascertained.** A question, however, at once arises, how is the amount of that compensation to be ascertained? What elements enter into it? Where the value of the property is to be included, how shall it be found? And if the value is fluctuating, what time, between the taking and the final judgment, shall be selected as the time when the value shall be regarded as attaching? When the goods have a fixed and unvarying value, comparatively little difficulty arises from this source; but when the price is constantly changing, the time which shall be seized upon as the time for fixing the value presents another question.

§ 532. **When the goods have changed in value.** It may appear that the goods may have been removed to a distance from the place of taking, and such removal may have enhanced or may have diminished their value. The transfer may have been with a design to deprive the owner of his property, or it may have been in ignorance of his rights. A radical change may have taken place in the condition of the property while in the defendant's possession, before or pending the suit, or while in plaintiff's possession, upon his writ. For example, a colt may have become a horse, or it may have died. Grass may have been cut and stacked, and the rain may have spoiled it; or any other of the changes incident to property may have taken place. These circumstances necessarily enter into the estimate of compensation, and must be carefully considered in all their bearings upon the rights of the parties.

§ 533. **The rule governing compensation applies only to cases where no malice or willful wrong is charged.** As before stated, the rule which usually governs the assessment of damages in replevin is based on the principle of compensation. The plaintiff, in his declaration, claims not only the goods, but damages for the taking or detention. Upon proof of such facts, he is entitled to such damages as will repair his loss.

oppression, damages must be confined strictly to compensation for the injury. *City of Chicago v. Martin*, 49 Ill. 241. Consult *Bell v. Cunningham*, 3 Peters, 69; *Tracy v. Swartwout*, 10 Peters, 81. The common law rule was inflexible. Compensatory damages alone were given. *Fidler v. McKinley*, 21 Ill. 325; 2 Bla. Com. 438; *Sedgwick on Meas. of Dam.* 26; *Parsons on Contracts*, 5 Ed. 164, *et seq.*

This rule is applicable in all cases of replevin, where no malice or willful wrong is charged.¹

§ 534. When taking was wrongful, damages estimated from the time of taking; otherwise, from the time of conversion. Where the taking was wrongful, the damages may be estimated from the time of the taking; but where it was rightful in the first instance, the damages can only be estimated from the time of the wrongful conversion. The reasons for this rule are apparent. A rightful possession by the defendant can be no injury to the plaintiff; but a wrongful taking is presumed to be an injury, even when no actual damage is the result. If the taking was rightful, originally, and the defendant refuse to deliver, on request, his detention from that moment is wrongful, and damages should be assessed from that time.

§ 535. Depreciation in value a proper element of damages. Where the property diminishes in value while it is wrongfully detained, the depreciation is usually a proper element of damages.² This rule applies alike to both parties. The wrongful detainer of property is liable for its depreciation while in his hands.³ The party cannot recover for the use, and at the same time have depreciation in value assessed.⁴ But in Nebraska, the diminution in value, with the interest on the entire value, was given.⁵

§ 536. The rule not uniform. No uniform rule can be given for ascertaining the extent of compensation. Different meas-

¹ *Bonesteel v. Orvis*, 22 Wis. 522; *Brannin v. Johnson*, 19 Me. 362; *Bruce v. Learned*, 4 Mass. 614; *Whitwell v. Wells*, 24 Pick. 33; *Allison v. Chandler*, 11 Mich. 542; *Baker v. Drake*, 53 N. Y. 212; *Warner v. Matthews*, 18 Ill. 87. Trespass for taking teas; plaintiff entitled to value and interest, after the usual time of credit on such sales. *Conard v. Pacific Ins. Co.*, 6 Pet. (U. S.) 262; *Pacific Ins. Co. v. Conard*, 1 Baldwin C. C. 138. See *Champion v. Vincent*, 20 Tex. 811; *Bateman v. Goodyear*, 12 Conn. 575; *Ives v. Humphreys*, 1 E. D. Smith, 196;

² *Hooker v. Hammill*, 7 Neb. 231; *Frey v. Drahos*, 7 Neb. 194; *Moore v. Kepner*, 7 Neb. 291; *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 117; *Gordon v. Jenney*, 16 Mass. 465; *Young v. Willet*, 8 Bosw. (N. Y.) 486; *Brizsee v. Maybee*, 21 Wend. 146.

³ *Rowley v. Gibbs*, 14 Johns. 385.

⁴ *Odell v. Hole*, 25 Ill. 204.

⁵ *Hooker v. Hammill*, 7 Neb. 234.

ures of redress may be proper for the same injury suffered under different circumstances. What will make good the loss which the party has sustained, owing to the situation in which he was placed when the injury was inflicted, is the material question. In determining this, all relevant circumstances ought to be carefully considered.¹

§ 537. **Interest as a measure of damage.** Interest upon the value is frequently regarded as a proper measure of damages. The common rule is to allow it in all cases upon the value of property after the date of the conversion, unless some particular reasons exist to the contrary.² When the wrong consists merely in the detention of property, (not the subject of daily use,) without waste or depreciation, or in the compulsory postponement of the exercise of the party's rights under legal process,³ interest is allowed. In fact, in all cases where damages are shown, in the absence of proof of some special damages, or proof that they were more or less than interest, interest upon the value during the time the successful party was deprived of his goods will usually be regarded as the only proper measure.⁴

§ 538. **How assessed.** When the jury, in assessing damages for defendant, estimate the value of the property at a time subsequent to the conversion, they cannot add to this value interest from the time of conversion.⁵ If interest was added from the time of conversion, such an assessment would

¹ *Shepherd v. Johnson*, 2 East, 211; *Berry v. Vantries*, 12 S. & R. 94; *Backenstoss v. Stahler*, 33 Pa. St. 257.

² *Hamer v. Hathaway*, 33 Cal. 119; *McDonald v. North*, 47 Barb. 530.

³ *Beals v. Guernsey*, 8 Johns. 446; *Hyde v. Stone*, 7 Wend. 354; *Bissell v. Hopkins*, 4 Cow. 53; *Ripley v. Davis*, 15 Mich. 75; *Robinson v. Barrows*, 48 Me. 186; *Oviatt v. Pond*, 29 Conn. 479; *Jones v. Rahilly*, 16 Minn. 322; *Derby v. Gallup*, 5 Minn. 119; *Scott v. Elliott*, 63 N. C. 215.

⁴ Stat., 3, 4, W. IV., Ch. 42, § 29; *Wood v. Braynard*, 9 Pick. 322; *N. Y. Guarantee Co. v. Flynn*, 65 Barb. 365; *Twinnam v. Swart*, 4 Lans. (N. Y.) 263; *Stevens v. Tuite*, 104 Mass. 333; *Ormsby v. Vermont Copper Co.*, 56 N. Y. 623; *Allen v. Fox*, 51 N. Y. 567; *Bartlett v. Brickett*, 14 Allen, 64; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Huggeford v. Ford*, 11 Pick. 223; *Mattoon v. Pearce*, 12 Mass. 406; *Barnes v. Bartlett*, 15 Pick. 78; *Caldwell v. West*, 1 Zab. (21 N. J.) 411; *Bonesteel v. Orvis*, 22 Wis. 522; *Bigelow v. Doolittle*, 36 Wis. 119; *Williams v. Phelps*, 16 Wis. 80.

⁵ *Atherton v. Fowler*, 46 Cal. 323.

in effect amount to double damages.¹ Where considerable time elapses between the verdict and the rendition of judgment, interest for that time cannot be included in the judgment.² This will not prevent the judgment from drawing such interest as is allowed by law.³ In some States the officer is authorized to seize the property and hold it for a limited time, to enable the plaintiff to give bond. If the plaintiff fails to furnish it, the property must be returned to the defendant; and where such is the case, interest upon the value, with any depreciation or injury it has sustained, is proper, together with the expense of replacing the property.⁴

§ 539. **Where a part only of the goods are found.** Where the plaintiff is successful, and where a part of the goods sued for were not found by the officers, and have not been delivered, the plaintiff is entitled to recover the value of such undelivered part; and interest upon such value from the time of taking may also be added as proper damages.⁵

§ 540. **In suit on bond.** In an action upon the bond for a failure to make return, when the property could have been returned but was not, and was converted, the value with interest thereon was allowed.⁶

§ 541. **Where the suit is concerning the validity of a sale.** Where the contest was about the validity of a sale of personal property, value at the time of seizure, and interest, was regarded as proper.⁷

§ 542. **Where defendant is a stakeholder.** Where the defendant was the mere stakeholder of two certified checks for \$2,500 each were replevied, the verdict was, "We, the jury, find the defendant guilty, and that the property replevied in

¹ Freeborn v. Norcross, 49 Cal. 313. See Landers v. George, 49 Ind. 309.

² Atherton v. Fowler, 46 Cal. 326.

³ Hamer v. Hathaway, 33 Cal. 119.

⁴ Morris v. Baker, 5 Wis. 389.

⁵ Booth v. Ableman, 20 Wis. 602; Graves v. Sittig, 5 Wis. 223; Pacific Ins. Co. v. Conard, 1 Baldwin, C. C. 142; Dana v. Fiedler, 2 Kern, (N. Y.) 40; Brizsee v. Maybee, 21 Wend. 144; Andrews v. Durant, 18 N. Y. 500.

⁶ Walls v. Johnson, 16 Ind. 374.

⁷ Miller v. Whitson, 40 Mo. 100. See, also, Woodburn v. Cogdal, 39 Mo. 222; Mayberry v. Cliffe, 7 Cold. (Tenn.) 118; Blackie v. Cooney, 8 Nev. 44.

said cause, and the right of possession of the same is in the plaintiff, and we assess the plaintiff's damages at \$6,275," judgment upon such a verdict was erroneous. The only damage which the defendant could in any event recover for the wrongful detention of the checks was the interest upon the \$5,000 from the time of the demand and refusal until they they were replevied.¹

§ 543. **Value of property, when allowed as damages.** When the plaintiff obtains possession of the property by the writ, and retains it until the trial, he, of course, cannot ask judgment for its value; when the property, however, is not delivered pending the suit, the plaintiff, if successful, is entitled to a judgment for the property or for its value; the value in such case, being one of the elements of damages, should be found by the jury.² In like manner, if the plaintiff has obtained the property upon his writ, and the verdict is for the defendant, the judgment usually is for a return of the goods. The finding in such case should embrace not only the damages for taking and detention, but also the value of the property, and the judgment is for the value in case the plaintiff fails to make the return as ordered by the court.³

§ 544. **The same.** So when the defendant retains the property by making claim of ownership, and giving bond under the statute, as he may in many States; upon a verdict for the plaintiff, the jury should find the value of the property, as well as the amount of damage for detention, so that the plaintiff may have judgment for the value in case the property is

¹ Merchants' S. L. & T. Co. v. Goodrich, 75 Ill. 559.

² Merrill v. Butler, 18 Mich. 294; Bates v. Buchanan, 5 Bush, (Ky.) 117. See Gordon ads. Williamson, 20 N. J. L. 77. The same results are reached in Illinois and some other States, when the count in trover is permitted to be filed with the *declaration* in replevin for such goods as the officer cannot find to deliver upon the writ.

³ Laborde v. Rumpa, 1 M'Cord, 15. At the common law, when the plaintiff complained that the defendant "still detained" the property, he was entitled to judgment for the value as well as damages for the taking and detaining. Easton v. Worthington, 5 S. & R. (Pa.) 131; Frazier v. Fredericks, 4 Zab. (24 N. J.) 170; Borron v. Landes, 1 Duv. (Ky.) 299; F. N. B. 69; Petre v. Duke, Lutw. 360.

not delivered to him.¹ When the plaintiff elects to proceed without asking delivery of the goods pending the suit, as he may do under some of our State statutes, in case he succeeds, the judgment is for the delivery of the property to him, or the payment of its value. And where his petition asks for damages for detention, he may prove the value of the property as a proper element of damages to be awarded him, the action in such case being in the nature of trover.² In each of these cases the judgment is in the alternative, for the property, or in case it cannot be had, for its value. These rules cannot be said to be universal in their application. In some of the States the judgment is for the property or its value, at the option of the party in whose favor it is rendered. In the absence of local laws or practice to the contrary, the principles stated will apply.

§ 545. **When value is regarded as attaching.** The foregoing sections may to some extent be a guide as to when the value is allowed to enter into the question of damages; and that having been settled, the question arises, when shall the value be regarded as attaching. What point in the history of the dispute shall be seized upon as the moment when the value shall be fixed.

§ 546. **Value at the time of conversion.** A large number of cases hold that the value at the time of the conversion, or at the time the delivery was refused, together with interest, is the proper rule.³ This question is exhaustively discussed in

¹ *Frazier v. Fredericks*, 4 Zab. (N. J.) 162; *Field v. Post*, 9 Vroom, (N. J.) 346.

² *Pugh v. Calloway*, 10 Ohio St. 488.

³ *Jacoby v. Lanssatt*, 6 S. & R. (Pa.) 300; *Ormsby v. Vermont Copper Co.*, 56 N. Y. 623; *Otter v. Williams*, 21 Ill. 118; *Whitfield v. Whitfield*, 40 Miss. 352; *Greer v. Powell*, 1 Bush. (Ky.) 489; *Keaggy v. Hite*, 12 Ill. 99; *Robinson v. Barrows*, 48 Me. 186; *Kennedy v. Whitwell*, 4 Pick. 466; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Parsons v. Martin*, 11 Gray, (Mass.) 111; *Pierce v. Benjamin*, 14 Pick. 356; *Riply v. Davis*, 15 Mich. 75; *Kennedy v. Strong*, 14 Johns. 128; *Bell v. Bell*, 20 Geo. 250; *Spicer v. Waters*, 65 Barb. 227; *Hendricks v. Decker*, 35 Barb. 298; *Lillard v. Whitaker*, 3 Bibb. (Ky.) 92; *Sproule v. Ford*, 3 Litt. (Ky.) 26; *Baltimore Ins. Co. v. Dalrymple*, 25 Md. 269; *Cushing v. Longfellow*, 26 Me. 307; *Shepherd v. Johnson*, 2 East. 211; *Davies v. Richardson's Ex'rs*, 1 Bay. (S. C.) 102; *Kipp v. Wiles*,

Whitfield v. Whitfield, 40 Miss. 352, where all the leading authorities on the subject are considered, and the court concludes its discussion: "From the examination which we have been able to give to this question, we think that may be safely affirmed: 1. That in actions for taking and detaining personal property, where no question of fraud, malice, oppression (or willful wrong, either in the taking or detention,) intervenes, the measure of damages is the value of the property at the time of the taking, or conversion, or illegal detention, with interest thereon to the time of trial; and this is a rule of law to be decided by the court. 2. That where the trespass, detention or conversion is attended by circumstances of malice, fraud, oppression, or willful wrong, the law abandons the rule of compensation, in a legal sense, and the measure of damages becomes a matter for the consideration of the jury, guided by the evidence before them. That under the first rule stated may be embraced all cases where the defendant, neither in the taking nor in the detention or disposition of the property, has been guilty of any willful wrong, but acts in good faith, and with no intent injuriously to affect plaintiff's rights. That under the second rule above stated may be embraced, 1, all cases where the original act was willful and wrongful; 2, or where the original act was *bona fide*, but the subsequent detention, sale, or other disposition of the property, after a knowledge of plaintiff's claim, was willful and injurious; 3, or where the original act, and subsequent disposition of the property for a

3 Sandf. 585. The expense of teams, etc., to remove the property, may become part of the damages. *Washington Ice Co. v. Webster*, 62 Me. 361. In a suit for damages to a defendant when there was no malice, the value of the property at the time it was replevied was held to be the proper rule. *Berthold v. Fox*, 13 Minn. 507; *Garrett v. Wood*, 3 Kan. 231. In trespass, the value at the time the trespass was committed. *Gilson v. Wood*, 20 Ill. 37. When the form of the action is assumpsit, for money had and received, the plaintiff can only recover the sum received, not the value of the goods. *Rand v. Nesmith*, 61 Me. 111; *Rowan v. St. Bank*, 45 Vt. 160. When the plaintiff was assignee of goods seized by the sheriff, on execution, and must have sold them if they had come to his hands, the jury could properly ascertain the price at which they were sold by the sheriff at auction, as the true measure of damages. *Whitehouse v. Atkinson*, 3 Car. & P. (14 E. C. L.) 344.

greater price than its market value, at the time of the original taking, were all in ignorance of the plaintiff's rights, but the defendant seeks to retain the difference, as a speculation resulting from his original unintentional wrong; 4, or where the property in controversy has some peculiar value to the plaintiff, and is willfully withheld from the rightful owner, or he has been deprived thereof by the willful and wrongful act of the defendant. In all such cases it is the peculiar province of the jury to find such damages, according to the convictions of their own understandings, as are consistent with right; not as a matter of law, under the control and direction of the court, but as a rule of remedial justice, resting in their discretion."

§ 547. **The same.** In England, the statute, 3 and 4 W. IV. c. 42, § 29, allows interest upon the value of the property at the time of the seizure or conversion, and indicates the conversion as the time at which the value should be fixed. This is the rule laid down in many well considered cases in this country.¹ Where the plaintiff was non-suited, the defendant was entitled to interest upon the value of the goods from the date of replevin.² The same principles apply in trover.³

§ 548. **This rule applicable when the value of the property is stable; rule when the value varies.** The rule which estimates the value at the time of conversion, with interest from that date, is equitable in cases where the value is stable. But when the value is changing, the rule would work unjustly in many, probably a majority, of cases; for instance, a wrongful taker could select the time when property was low, and derive a profit by seizing and disposing of it; therefore, where the value is changing, some other more equitable method must be devised.

¹ *Yater v. Mullen*, 24 Ind. 277. What it would take to replace the goods was held to be the measure of damages; in *Starky v. Kelly*, 50 N. Y. 676. The value of the property at the time it should be restored; in *Swift v. Barnes*, 16 Pick. 196. The damages not governed by any fixed rule, but arbitrary, and to be estimated by the jury in view of all the circumstances. *Jones v. Allen*, 1 Head. (Tenn.) 626. The value with interest from the time of the conversion; *Greenfield Bank v. Leavitt*, 17 Pick. 3.

² *Wood v. Braynard*, 9 Pick. 322; *Barnes v. Bartlett*, 15 Pick. 78.

³ *Barnes v. Bartlett*, 15 Pick. 78.

§ 549. **The highest value after taking and before trial.** Many cases regard the highest value between the time of conversion and trial, as the proper one to be fixed.¹ *Markham v. Jaudon*, 41 N. Y. (Hand.) 235, was a case where the plaintiff furnished a margin for the purpose of buying stocks, and the defendant, with ten per cent. of plaintiff's money and ninety per cent. of his own, purchased the stocks for plaintiff. Defendant sold the same without orders, and the court following the principles laid down in the cases last cited, gave damages at the highest prices after conversion and before judgment. This case has been cited and followed in a number of others. And, although the soundness of the rule has been affirmed as a general principle, its universal application has been denied.

§ 550. **The same.** In *Matthews v. Coe*, 49 N. Y. 57, CHURCH, Ch. J., said: "An unqualified rule, giving the plaintiff the highest price between the conversion and the time of trial, cannot be upheld on any principle of reason or justice." In *Baker v. Drake*, 53 N. Y. 213, the court said: "The rule laid down in *Markham v. Jaudon*, has been recognized in several cases where the value of the property was fluctuating, but its soundness as a general rule has been seriously questioned and denied in various cases."² The court there reviewed and examined a number of leading cases upon this subject, and concluded that the principles laid down in *Markham v. Jaudon*, were not to be regarded as settled rules to which the principle of *stare decisis* should apply.³

§ 551. **The same. Observations upon the rule.** It may, however, safely be said that this rule, though somewhat circumscribed, continues to be a very general and necessary rule, *Matthews v. Coe*, and *Baker v. Drake*, *supra*, only limiting or directing the application, but not superseding the rule.⁴

¹ *Cortelyou v. Lansing*, 2 Cain's Ca. 200; *Barnett v. Thompson*, 37 Geo. 335; *Burt v. Dutcher*, 34 N. Y. 493; *Markham v. Jaudon*, 41 N. Y. (Hand.) 235; *Morgan v. Gregg*, 46 Barb. 183; *Wilson v. Mathews*, 24 Barb. 295; *Romain v. Van Allen*, 26 N. Y. 309.

² *Baker v. Drake*, 66 N. Y. 518.

³ See *Morgan v. Jaudon*, 40 How. Pr. 366; *Stewart v. Drake*, 46 N. Y. 449.

⁴ *Hamer v. Hathaway*, 33 Cal. 119; *Douglass v. Kraft*, 9 Cal. 563; *West v.*

§ 552. **The same.** In detinue for shares of stock which had been delivered to the plaintiff after suit was brought, the property was worth £3 5s. when demanded, and £1 at the time of delivery. This difference the plaintiff was allowed to recover.¹ In trover, the jury are not limited to any precise time, but may fix the value at any time between the demand and judgment.² If at the time the return is ordered, the property had increased in value, the defendant would be entitled to any increase that occurred, as the goods are his; if it had diminished, the loss ought to fall upon the plaintiff, as he wrongfully interfered with the defendant's possession, and thus occasioned it.³

§ 553. **Qualifications of the rule; suit must be brought within a reasonable time.** This rule allowing the highest market price at any time after the taking and before judgment, is without doubt sustained by a large number of the cases in this country and England, prior to the statute 3 and 4 W. IV. c. 42, § 29. The rule, however, must be taken with this qualification, that the suit must be brought within a reasonable time, and its trial urged with all reasonable diligence. The plaintiff has no right to wait until the period of limitation is about to expire, nor to delay his suit for the purpose of having a longer time within which to compute damages. It is a rule of doubtful justice, said the court, to give the plaintiff the whole period of the statute of limitations within which to select his standard of value.⁴

§ 554. **The same.** This question arose in California upon the replevin of hay taken in 1863, when it was worth three to five dollars per ton. The trial was in 1869. The defendant

Wentworth, 3 Cow. 82; *Allen v. Dykers*, 3 Hill, 593; *Blot v. Boiceau*, 3 Comst. 85; *Lobdell v. Stowell*, 51 N. Y. 77; *Willard v. Bridge*, 4 Barb. 361; *Wilson v. Mathews*, 24 Barb. 295; *Commercial Bank v. Kortright*, 22 Wend. 348; *Kortright v. Com. Bank*, 20 Wend. 91.

¹ *Williams v. Archer*, 5 M. G. & S. 318. See *Archer v. Williams*, 2 Car. & K. (61 E. C. L.) 26; *Barnett v. Thompson*, 37 Geo. 335; *Morgan v. Gregg*, 46 Barb. 183.

² *Johnson v. Marshall*, 34 Ala. 528.

³ *Washington Ice Co. v. Webster*, 62 Me. 341; *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 124.

⁴ *Scott v. Rogers*, 31 N. Y. 678.

proved that in 1864 it was worth thirty-eight to forty dollars per ton. The court, in discussing the case, said: "If a quantity of fruit, strawberries, for instance, be taken in the season of the greatest plenty, under circumstances which entitle the owner to indemnity only, and suit began at once to recover the value, trial, in the ordinary course of events, could not take place for many months. In the meantime the season of plenty has passed and the price has risen enormously, and under the rule allowing the highest prices the plaintiff could recover the enhanced value which he could by no possibility have realized himself." Under this construction the plaintiff received a verdict for \$25,763 for property not worth more than \$2,500 when it was taken. When we consider that the object to be attained is indemnity for losses actually sustained, this result is startling. The court then follows the rule laid down in *Scott v. Rogers, supra*, and says the correct measure of damages is the highest market price within a reasonable time;¹ and this agrees with the rule in *Cannon v. Folsom*, 2 Iowa, 101, where many cases were cited, and with *Pinkerton v. Railroad, etc.*, 42 N. H. 424.

§ 555. **What is highest market value.** The rule is also subject to the following additional qualification, that the term "highest market value" embraces only such changes in the market as are due to the ordinary commercial causes. A sudden panic, or unusual excitement, or conspiracy among dealers, may give any article of merchandise a speculative but purely fictitious value. Such prices ought not to be taken into consideration by the courts in ascertaining values or damages to be awarded to contending suitors.² By "the highest market value," as used in this connection, the law also contemplates the range of the entire market and an average of prices running through a reasonable period of time, not any sudden or transient inflation or depression resulting from causes independent of the operation of lawful commerce.³

§ 556. **Further qualification of the rule.** The rule is sub-

¹ *Page v. Fowler*, 39 Cal. 416.

² *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 124.

³ *Smith v. Griffiths*, 3 Hill, 333; *Durst v. Burton*, 47 N. Y. 175.

ject to the further limitation that the party must show himself to be the owner of the property for which he claims such damages. For example, the plaintiff put up a margin and directed the defendant to purchase stocks, which the defendant afterwards sold without plaintiff's consent. Here the speculation was carried on with the defendant's money. If the plaintiff had had the chance of profit, he was subject also to the chance of a decline, which he avoided; he was also subject to the chance of his not availing himself of the use of the rise at the proper moment, which is no inconsiderable element, and the fact exists that if the stocks had risen he would, perhaps, have been unable to make further advances to hold them. The value of the stocks in such case would be improper. The proper course would have been for the plaintiff, on being notified of the sale, to have signified his disapproval and directed the defendant to replace the stocks, and if he had not done so, the plaintiff might have then bought the stock and charged him with the loss in so doing. The circumstances of a case like this will not warrant the transfer of all the chances of loss to the defendant, holding him responsible for all possible chances of gain, and making him an insurer that the plaintiff would have made that gain.¹ Where the goods are of a kind that varies in quality, and one party, by any artifice, deprives the other from showing the real quality, the presumption as to quality will be against the party who practices the fraud.²

§ 557. **Measure of damages in suit for a note or bill.** The measure of damages in a suit for a bill or note seems to be, *prima facie*, the amount of the bill or note; the defendant, however, may give in evidence the insolvency of the maker, or any payment made on it, or any other facts showing the real value of the instrument, or that the actual damages were less.³ If, however, defendant has done any act to diminish

¹ Baker v. Drake, 53 N. Y. 211. See same case, 66 N. Y. 518.

² Bailey v. Shaw, 4 Foster, (N. H.) 301.

³ Potter v. Merchants' Bank, 28 N. Y. 641; Am. Ex. Co. v. Parsons, 44 Ill. 318; Keaggy v. Hite, 13 Ill. 99; Menkens v. Menkens, 23 Mo. 252; Ingalls v. Lord, 1 Cow. (N. Y.) 240; Robbins v. Packard, 31 Vt. 570.

the value, if he has mutilated the note or erased a signature from it, such decrease in value, instead of being allowed in mitigation of damages, must be made good by the party who caused it;¹ and, as a rule, nothing done by the defendant while the goods are in his wrongful possession can avail him to reduce the damages for which he may be liable.² So, if the defendant has received a payment, and endorsed it upon the note, such endorsement is no ground to reduce the value. Bringing the money into court for the plaintiff, or restoring the note, will go to decrease the damages.³

§ 558. **The same.** Probably the most concise statement of the rule generally applicable in such cases is that the measure of damages is the *value* of the note, not necessarily the amount due, or purporting to be due upon it.⁴ When the plaintiff put a city order into hand of parties to investigate a fraud in its issue, and then refused to return it, he was entitled to recover from them its full value; as it could not be collected from the city, he was not entitled to its face value.⁵

§ 559. **The same.** A bankrupt gave a check to one of his creditors, which was paid by the bank upon which it was drawn. The assignee brought trover and obtained a verdict for the full amount of the check. The action was based upon the fact that the check was drawn by the bankrupt without authority, his property belonging to his assignee. The verdict was set aside. MANSFIELD, C. J., said, "the plaintiff proceeds on the ground that the check, being drawn by a bankrupt, was worthless. If the position taken be true, how can he recover £300 on it."⁶

§ 560. **The value of coin sometimes estimated in currency.** Coin may at times be regarded as an article of merchandise, upon which a market value may be placed in ordinary currency. In such a case, it was said that the measure of damages for its non-delivery was properly fixed by estimating its

¹ McLeod v. McGhie, 2 M. & G. (40 E. C. L.) 326; Am. Ex. Co. v. Parsons, 44 Ill. 318.

² Carter v. Streater, 4 Jones, (N. C. L.) 62.

³ Alsayer v. Close, 10 Mees. & W. 576.

⁴ Turner v. Retter, 58 Ill. 264.

⁵ Terry v. Allis, 16 Wis. 479; Terry v. Allis, 20 Wis. 32.

⁶ Mathew v. Sherwell, 2 Taunt. 439.

value in currency at the highest price between the time of taking and the trial.¹ When the property in controversy was a billiard table, the plaintiff offered proof that it was worth \$500 in gold coin, and proved its value in legal tender or greenbacks, (to which an objection was made,) at \$1,200. The court permitted the evidence, and sustained a verdict for \$950.²

§ 561. **Damages occasioned by party's own act not allowed.** No one should be permitted to recover damages which are occasioned by his own act, neglect or default. When the plaintiff failed to give the proper bond, and to take possession of the property described in his writ, he could not recover damages for any deterioration, or for the detention while it was in the hands of the officer, through his neglect to furnish the security required by law.³

§ 562. **The place where the value is considered as attaching.** The place where the value is to be considered as attaching is sometimes a question of considerable importance; as in cases where the property is taken or detained at a point distant from any market for such articles, where, perhaps, it could not be sold at any price, or if sold, it would be at a ruinous sacrifice, while at a neighboring market a fair price might be obtained; or where the property may have been taken at a place where there was no market for it, and by the taker transported at great cost, and sold at a price sufficient to pay not only the cost of transportation, but a fair profit upon the article. In all such cases it becomes a question of no little difficulty to determine which value shall be regarded as attaching to the property, the value at the place of taking, or at the distant market, and also whether the costs of transporting, when such costs have been incurred by the taker, shall be deducted. A solution of these questions will be best determined by a reference to cases involving such principles.

§ 563. **The same.** General rule is, value where the goods were detained; value in another market may be evidence. As

¹ Taylor v. Ketchum, 35 How. Pr. (N. Y.) 289; Taylor v. Ketchum, 5 Robt. (N. Y.) 507.

² Tarpv v. Shepherd, 30 Cal. 181.

³ Graves v. Sittig, 5 Wis. 219. See, also, Williams v. Phelps, 16 Wis. 80, where this case was commented on.

a general rule, it may be stated that the value of the goods at the place where they were detained, that is, at the place where demand was made, or delivery should have been made, is the proper one. The value in an adjacent market may be proved as a fact not establishing the value, but as an aid to assist the court or jury in arriving at the true value at the place where the detention was had; and cases frequently arise where such proof, coupled with testimony of the cost of reaching such market, becomes relevant and proper in the highest degree. Where the property, however, when demanded, is situated at or adjacent to a steady and reliable market for such goods, the value at that place should govern, without reference to a distant, though perhaps more advantageous one.¹ In trespass for timber cut and removed, the court said the plaintiff might have recovered his logs, had he chosen to pursue them; but as he elected to sue in trespass, he therefore can recover only the value of the logs at the place where the injury was done.² So, where the action was for coal dug in the mine of another.³

§ 564. **The same. Expense of transportation, etc.** When the action was for hay taken in Alameda County, and afterwards transported by the defendant to San Francisco, the plaintiff claimed the highest price at the latter place. The court said the market value was to be ascertained at the place where the conversion was had.⁴ In *Hisler v Carr*, the court said: "The value which the plaintiff is entitled to recover under our statute is the value of the property, to be ascertained at the place where it is detained, when the action was commenced." The property in this case was produce, part of which was shipped to San Francisco and sold. The plaintiff claimed the gross products of the sale, while the defendant claimed that a deduction should be made for the expenses in shipping, etc. The court said, in substance, that where, as in the present case, the plaintiff complains only of the detention of the property, if it is delivered on demand, his claim is satisfied, except damages for

¹ *Fort v. Saunders*, 5 Hiesk. (Tenn.) 487.

² *Cushing v. Longfellow*, 26 Me. 306.

³ *Martin v. Porter*, 5 M. & W. 353.

⁴ *Hamer v. Hathaway*, 33 Cal. 120.

detention; if it cannot be had, then the value at the place where the delivery should have been made stands in lieu of the property. Neither the price at San Francisco, nor that price less the freight and commissions, is the true criterion of the value at the place of the alleged detention; but proof of the value at San Francisco, and the cost of transportation there, is admissible to assist the jury in fixing the value at the place of detention.¹ The cost of manufacturing an article, and its transportation to market, may properly be given in evidence, not as fixing its value, but as a fact from which its value, at the time and place of conversion, may be arrived at.²

§ 565. **The same.** The suit was for the value of cattle which died of disease, through the wrongful act of defendant, as was charged. At the point where the cattle died there was no market, and it did not appear that any market for such cattle was to be found within two hundred miles. The court allowed evidence of the value at this distant market; the price there would necessarily be some guide to the value where the cattle were.³

§ 566. **The same. Reason for the rules stated.** This testimony, it will be observed, is not permitted as fixing the value, but as furnishing a guide by which the true value may be ascertained, by a process not unlike the computations of value, or interest which has always been allowed. A similar principle has been recognized in a late case in Illinois. The action was trover for the value of cast steel ingots. The court said there being no testimony as to the value of these ingots at the time of the alleged conversion, for the reason that they had no market value, it was not error to allow proof of what steel made from these ingots was worth per pound in the market, and proof of how much it would cost to convert these ingots into merchantable steel; thus allowing the jury to make a fair approximation of the value of the ingots.⁴

¹ *Hisler v. Carr*, 34 Cal. 645; *Swift v. Barnes*, 16 Pick. 196; *Cushing v. Longfellow*, 26 Me. 310.

² *Brizsee v. Maybee*, 21 Wend. 144.

³ *Sellar v. Clelland*, 2 Colorado, 532.

⁴ *Meeker v. Chicago Cast Steel Co.*, 84 Ill. 277. Consult in this connection

§ 567. **Trespasser cannot recover for his labor in increasing the value.** A party cannot commit a trespass upon his neighbor, and then charge him with the expense of the labor. If so, a thief might cut through a wall and charge the owner for making a new doorway. Where a trespasser cut wheat, he was not allowed to deduct the cost of cutting, though he performed the whole labor of harvesting it.¹ So where timber is wrongfully taken and made into shingles, the owner may recover the value as shingles;² or if transported to a distant market, the owner may recover the goods or value at that market.³ The rule may be regarded as general and well settled that a wrongdoer cannot sell the goods and compel the owner to accept the price at which they were sold. If there has been a loss, the owner is under no obligation to incur it.⁴

§ 568. **Or make a profit out of his wrongful taking.** Neither is such a taker or detainer permitted to make a profit out of his wrong. If the goods have been sold at a profit, the owner is entitled to it, and the wrongful taker cannot assert any right to it which is not based upon ownership of the property.⁵ In *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 621, after an exhaustive consideration of this question, the court laid down the rule as follows: "Add to the value of the property when the owner is dispossessed, the damages which he is proved to have sustained from the loss of its possession." It is when the property is wrongfully taken or detained that a right of action accrues to the owner. He is then entitled to demand a compensation for his loss; and if his demand is then complied with, it is plain that the value of the property

Savercool v. Farwell, 17 Mich. 308; *Gregory v. McDowell*, 8 Wend. 435. The defendant was not allowed to show what effect the sale of so large a quantity would have on the market. *Dana v. Fiedler*, 2 Kern. 40; *Berry v. Dwinel*, 44 Me. 267; *Dubois v. Glaub*, 52 Pa. St. 238; *Doak v. The Exr. of Snapp*, 1 Cold. (Tenn.) 181; *Durst v. Burton*, 47 N. Y. 175; *Smith v. Griffith*, 3 Hill, 333; *Wemple v. Stewart*, 22 Barb. 154.

¹ *Bull v. Griswold*, 19 Ill. 631.

² *Baker v. Wheeler*, 8 Wend. 506.

³ *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 492.

⁴ *Hamer v. Hathaway*, 33 Col. 119; *Douglass v. Kraft*, 9 Cal. 562.

⁵ *Whitfield v. Whitfield*, 40 Miss. 352; *Mayberry v. Cliffe*, 7 Coldw. (Tenn.) 124; *Suydam v. Jenkins*, 3 Sandf. 615.

at that time, by which we mean its market value, the sum for which it could then be sold would constitute at least a portion of the amount that the wrong-doer would be bound to pay. This sum may, therefore, be fairly considered as a debt then due, and consequently interest, until the time of trial or judgment, must in all cases be added to complete the indemnity. It is not, however, in all cases that the value of the property when the owner is dispossessed is to be determined by a reference to its market price, nor in all that the damages, which are to be added to the value, are to be limited to the mere allowance of interest. In most cases the market value of the property is the best criterion of its value to the owner; but in some cases its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc.; and we do not doubt that the "*pretium affectionis*," instead of the market price, ought then to be considered by the jury or court in estimating the value. In these cases, however, it is evident that no fixed rule to govern the estimate of value can be laid down, but it must of necessity be left to the sound discretion of a jury. But where an assignee for the benefit of creditors, who must have sold the goods had they come to his hands, brought suit against a sheriff who had seized them upon an execution, the jury might properly allow the amount for which they were sold by the sheriff.¹

§ 569. **Statement of value in the affidavit usually binds the plaintiff, but not the defendant.** When the value of property is to be assessed, the statement in the affidavit of the plaintiff as to the value is frequently regarded as estopping him from asserting a different value. After fixing the value at a time when he was seeking the delivery of the property on the writ, he should not be heard to complain of the value so fixed by himself; but the defendant, who is in no way concerned in so fixing the value, is, of course, not affected by it.² This rule

¹ *Whitehouse v. Atkinson*, 3 C. & P. 344.

² *Gray v. Jones*, 1 Head. 544; *Huggeford v. Ford*, 11 Pick. 225; *Swift v. Barnes*, 16 Pick. 196; *Middleton v. Bryan*, 3 Maul. & S. 155; *Tuck v. Moses*,

may in some cases work injustice, and in exceptional cases the plaintiff may be heard to explain what is in ordinary cases *prima facie* evidence against him.¹ But this does not authorize the clerk of the court to enter up judgment against the plaintiff for that value, upon a default and order for restitution. The right to possession or title to property is the real issue to be tried, and not the value.² The value is required to be found in certain States to inform the court what judgment to render or what sum to collect in case return or delivery cannot be had; otherwise the value is immaterial in the replevin suit.³ When the property is expected to diminish in value by lapse of time, the obligor ought to be bound by the value stated by himself.⁴ The enforcement of this rule is calculated to promote a fair and reasonable estimate, in his affidavit, by the party seeking the delivery.

§ 570. **Appraisement does not bind either party.** An appraisement of the value, under the statute, and a return of that value, does not preclude either party from offering the testimony of competent witnesses so as to show the real value,⁵ as in such case neither party is called upon to act in making the appraisal. Neither is such an appraisal binding upon the sheriff who caused it to be made. But in case an officer is sued, his return of an appraisement which he caused to be made may be admitted as *prima facie* evidence against him.⁶

§ 571. **Special damages must be specially pleaded.** Special damages not naturally arising from the tortious act complained of, must be especially alleged in the declaration, and proved as alleged.⁷ The circumstances of the taking need not be set

58 Me. 477; *Parker v. Simonds*, 8 Met. 205; *Clap v. Guild*, 8 Mass. 153; *Washington Ice Co. v. Webster*, 62 Me. 341.

¹ *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 34.

² *Thomas v. Spofford*, 46 Me. 408.

³ Cases last cited.

⁴ *Howe v. Handley*, 28 Me. 251; *Swift v. Barnes*, 16 Pick. 194; *Parker v. Simonds*, 8 Met. 205.

⁵ *Kafer v. Harlow*, 5 Allen, 348; *Leighton v. Brown*, 98 Mass. 515; *Wright v. Quirk*, 105 Mass. 48.

⁶ *Sanborn v. Baker*, 1 Allen, 521; *Kafer v. Harlow*, 5 Allen, (Mass.) 348.

⁷ *Bodley v. Reynolds*, 8 Q. B. 779; *Park v. McDaniels*, 37 Vt. 594; *Damron v. Roach*, 4 Humph. (Tenn.) 134; *Slack v. Brown*, 13 Wend. 390, 393; *Scho-*

out to entitle the plaintiff to damages commensurate with the injury which the taking occasioned and which are the natural or expected result of such taking;¹ and under a general allegation of damages, the plaintiff may prove any depreciation in the value of the goods while they were in the defendant's hands, from any naturally expected cause;² but any and all special damages from whatever causes arising, such as loss of business where that is proper, unexpected depreciation in value of the property, or damages from any wrongful act of the party subsequent to the taking, should be specially alleged.³

§ 572. **Loss by interruption of business.** In replevin, as in all other actions in the nature of tort, the damages should not be less than the amount of loss actually sustained, but the loss must be real, not speculative or probable merely.⁴ Where the landlord wrongfully cut off steam power from his tenant's mill, the tenant had a right to suppose it was permanent, and dispose of his stock, machinery and fixtures, on the best terms he could, and the wrong-doer should be held liable for any loss that might be sustained from such a sale, so far as the same was the natural and probable result of the landlord's wrongful act. In estimating the loss sustained by breaking up his established business, there would seem to be no well founded objection to ascertain the amount of profits which it

field v. Ferrers, 46 Pa. St. 438; *Armstrong v. Percy*, 5 Wend. 535; *Strang v. Whitehead*, 12 Wend. 64; *Bennett v. Lockwood*, 20 Wend. 223; *Smith v. Sherwood*, 2 Tex. 460; *Bogert v. Burkhalter*, 2 Barb. 525; *Vanderslice v. Newton*, 4 Comst. (N. Y.) 130; *Burrage v. Melson*, 48 Miss. 237; *Stevenson v. Smith*, 28 Cal. 102; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Davis v. Oswell*, 7 C. & P. 804. See *White v. Suttle*, 1 Swan. (Tenn.) 174.

¹ *Schofield v. Ferrers*, 46 Pa. St. 438; *Fagen v. Davison*, 2 Duer. 153. But see and compare, *Woodruff v. Cook*, 25 Barb. 505.

² *Young v. Willett*, 8 Bosw. (N. Y.) 486. Even though the damage did not accrue until some time afterward. *Dickinson v. Boyle*, 17 Pick. 78; *Brown v. Cummings*, 7 Allen, 507. The following English cases, though none of them cases in replevin, illustrate the rule requiring special damages to be pleaded specially: *Rose v. Groves*, 5 M. & G. 613; *Sippora v. Basset*, 1 Sid. 225; *Lowden v. Goodrick, Peake*, (N. P.) 46; *Pettit v. Addington, Peake*, (N. P.) 62; *Lindon v. Hooper*, 1 Cowper, 418.

³ *Stevenson v. Smith*, 28 Cal. 103; *Strang v. Whitehead*, 12 Wend. 64; *Dewint v. Wiltsie*, 9 Wend. 326.

⁴ *Baker v. Drake*, 53 N. Y. 212; *Loker v. Damon*, 17 Pick. 284.

has yielded for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade or other causes they would have been less.¹

§ 573. **The same. Prospective profits.** This rule is probably more liberal than that sustained by the current of authority, though cases may be found to support it. But as a rule, damages which include the expected profits of the party in business with the hazard attending it, are usually regarded speculative, rather than real.² For example, profits which are expected from the use of circus horses in the circus business, cannot be a measure of damages;³ and as a rule, purely speculative or contingent damages can never be allowed.⁴ The expected profits of a stock speculation carried on with the defendant's capital, cannot be a proper element of damages in a suit for an unauthorized sale of stocks by the defendant, who was the broker.⁵ The profits of an illegal business cannot be an element of damages in any case. The expected profits of a patent machine cannot be allowed.⁶ And as a general thing, loss by a mercantile firm by the seizure of their goods and interruption to their business, and consequent loss of expected profits, is not a proper element in computing damages.⁷

§ 574. **Loss of real or probable profits.** The jury may

¹ *Chapman v. Kirby*, 49 Ill. 219. A very similar case, *White v. Moseley*, 8 Pick. 356. See, also, *Davenport v. Ledger*, 80 Ill. 578. When a party leased a tavern and agreed to keep a certain ferry in good order, and afterward diverted the travel to another ferry, the lessor was allowed to recover his rent, but not expected profits. *Dewint v. Wiltsie*, 9 Wend. 326.

² *Bonesteel v. Orvis*, 23 Wis. 524. See *Seldner v. Smith*, 40 Md. 603; *Brannin v. Johnson*, 19 Me. 361.

³ *Butler v. Mehrling*, 15 Ill. 490. See, also, *Butler v. Collins*, 12 Cal. 457; *Campbell v. Woodworth*, 26 Barb. 648.

⁴ *Houghton v. Peck*, 8 Pa. St. 42. See cases last cited.

⁵ *Baker v. Drake*, 53 N. Y. 211.

Houghton v. Peck, 8 Pa. St. 42.

Selden v. Cashman, 20 Cal. 57. See *Allred v. Bray*, 41 Mo. 484. For wrongful attachment, plaintiff was allowed to prove that her business was destroyed and she reduced to poverty. *Moore v. Schultz*, 31 Md. 418. See *Oviatt v. Pond*, 29 Conn. 479.

allow for the loss of near and stable or probable profits.¹ So when the plaintiff's bridge was carried away by the wrongful act of the defendant, the loss of tolls during the time necessarily required to rebuild it, is a proper element of damages.² Of course the jury must take into consideration the degree of probability that the party would have made a profit;³ and damages can never include expected profits, unless it appear affirmatively that the party was absolutely prevented from realizing them by some act of the party in default;⁴ a party cannot permit his business to lie still or suffer a loss of profit, and collect the damages so occasioned, from the defendant.⁵

§ 575. **Party claiming damages must do what he can to avoid loss.** A party may show that he has done all in his power to avoid the damaging effect of the defendant's act, and such evidence will not diminish the damages.⁶ If a trespasser willfully leaves his neighbor's gate open, and cattle enter and destroy his crop, the trespasser is liable; but if the owner pass it before the cattle enter, and refuse to shut it, he cannot recover.⁷ The rule may be stated, that a party who suffers injury from the wrongful act of another, must do what he can to render the evil results as light as possible.⁸ Where the defendant took the plaintiff's horse, which was useful to him in the way of trade, he was allowed the cost of hiring another horse, less the amount he would have paid for keeping his own while it was taken.⁹

§ 576. **Expenses, counsel fees, etc.** Expenses sometimes form a part of the damage which a party has really sustained, and the question as to how far they can be reimbursed, is one of considerable importance. As a rule, expenses of the party

¹ *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 124. Compare *Pacific Ins. Co. v. Conard*, 1 Baldw. (C. C.) 138.

² *Sewells Falls Bridge v. Fisk*, 23 N. H. 171.

³ *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 124.

⁴ *Palm v. The Ohio & Miss. R. R. Co.*, 18 Ill. 217; *The County of Christian v. Overholt*, 18 Ill. 223.

⁵ *Brizsee v. Maybee*, 21 Wend. 144.

⁶ *Chandler v. Allison*, 10 Mich. 461

⁷ *Loker v. Damon*, 17 Pick. 289.

⁸ *Chandler v. Allison*, 10 Mich. 461

⁹ *Davis v. Oswell*, 7 Car. & P. 804.

in endeavoring to recover his property, time spent in getting the writ, attending court, etc., are not allowable as part of the damages.¹ Neither are counsel fees and other expenses of the suit, apart from the costs adjudged, strictly recoverable in the way of damages.² The only ground on which they should be allowed is in case where the jury, as a matter of discretion with which they may be vested, consider the expenses in order that the plaintiff may not be impoverished by the cost of asserting his right in court.³ In Connecticut the rule appears to be that, when the injury is wantonly inflicted, the expenses of litigation may be included as a proper part of the damages.⁴

§ 577. **The same.** In *Pacific Ins. Co. v. Conard*, 1 Baldwin, (U. S. C. C.) 138, the court instructed the jury that in cases where the taking was willful, the expenses which the party has been put to, to assert his rights, might properly be taken into consideration by them in making up their estimate of damages. In New York it was said that where the taking was wrongful, the plaintiff may recover a reasonable amount for time and expense incurred in endeavoring to reclaim his property.⁵ Where the defendant took the plaintiffs' horse and wagon, by reason of which the plaintiffs were induced to think that the person to whom they let it had absconded, and they expended considerable time and money in search of their property, the value of the time and the amount of the expenses were allowed as a proper element of damages.⁶ In an action for false imprisonment, for an illegal arrest of plaintiff, evidence of the value of the counsel's fees was not admitted, not

¹ *Blackwell v. Acton*, 38 Ind. 426. But, *contra*, see *Bennett v. Lockwood*, 20 Wend. 222.

² *Park v. McDaniels*, 37 Vt. 594; *Earl v. Tupper*, 45 Vt. 287; *Hoadley v. Watson*, 45 Vt. 289; *Pacific Ins. Co. v. Conard*, 1 Baldwin, (C. C.) 138.

³ *Williams v. Ives*, 25 Conn. 568; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Earl v. Tupper*, 45 Vt. 275; *Hoadley v. Watson*, *Ib.* 289.

⁴ *Linsley v. Bushnell*, 15 Conn. 225; *Welch v. Durand*, 36 *Ib.* 182; *Platt v. Brown*, 30 Conn. 336; *Dibble v. Morris*, 26 Conn. 416; *Ives v. Carter*, 24 Conn. 392; *Beecher v. Derby Bridge Co.*, 24 Conn. 491.

⁵ *McDonald v. North*, 47 Barb. 530. See *Yantis v. Burditt*, 2 Dana, (Ky.) 254.

⁶ *Bennett v. Lockwood*, 20 Wend. 223.

being specifically laid in the declaration.¹ In Wisconsin it has been held that counsel fees can no more be allowed in actions where vindictive damages are given than in other actions. If they can be given by the jury it must be on the principle that they are consequential and relate to the amount of the compensation proper to award, rather than that they enter directly into the compensation.² So, in Indiana, in a suit on the bond, it was said the plaintiff cannot recover fees paid his counsel in the replevin case, nor in the suit on the bond, nor is he entitled to any fees for his own attendance in the furthering of his suit.³ In Vermont the rule has been stated that counsel fees did not form a proper element of damages.⁴ So, also, in Michigan.⁵ In Ohio the supreme court said in substance, that in cases nominally in tort, where no real malice is complained of, counsel fees ought not to be included; but when the act complained of involves the ingredient of malice, or insult, the jury which has the power to punish has necessarily the right to include counsel fee in their estimate of damages, if they see proper to do so.⁶

§ 578. **Expense of taking and removing the property.** The expenses of taking and moving the property by the officer should not be included in the damages. They constitute a part of the costs of the case and should be so assessed.⁷ Where an officer seized horses of A. on an execution against him and A. afterwards replevied the horses from the custodian in whose charge they were left, and afterwards suffered nonsuit in the replevin case, the costs of keeping the horses was held a part of the costs on the execution.⁸ In Illinois, in a suit on a replevin bond, the court said that where the party

¹ *Strang v. Whitehead*, 12 Wend. 64.

² *Fairbanks v. Witter*, 18 Wis. 287.

³ *Davis v. Crow*, 7 Blackf. 130; *Blackwell v. Acton*, 38 Ind. 425.

⁴ *Earl v. Tupper*, 45 Vt. 275; *Hoadley v. Watson*, 1b. 239.

⁵ *Hatch v. Hart*, 2 Gibbs, (Mich.) 289; *Warren v. Cole*, 15 Mich. 269.

⁶ *Roberts v. Mason*, 10 Ohio St. 277. See, *contra*, *Day v. Woodworth*, 13 How. 363.

⁷ *Young v. Atwood*, 5 Hun. (N. Y.) 234. Compare *Washington Ice Co. v. Webster*, 62 Me. 341.

⁸ *Davis v. Crow*, 7 Blackf. 131.

was driven to compulsory process to secure the property which was ordered to be returned to him in the replevin suit, he could recover the costs of so doing in his action on the bond. The costs of the return were not a part of the costs for which he could have judgment in the replevin suit and were a proper item in the suit on the bond.¹

¹ *Langdoc v. Parkinson*, 2 Bradw. (Ill.) 136.

CHAPTER XVIII.

DAMAGES. — CONTINUED.

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§ 579. **Value of the use, when proper to be allowed.** In many cases the property in dispute may possess considerable value for use, and small value, as merchandise, for sale or for consumption. In such cases the value of the use is frequently adopted as the measure of damages. For example, where work-cattle or horses, tools, or implements of trade or husbandry, are taken from the owner, who is thereby deprived of their use, the reasonable value of that use will, in many cases, be the only just compensation for their detention.¹ It would be highly unjust to hold that a party might take a span of horses worth, say one hundred and fifty dollars, and detain them a year and then pay six per cent. on the value as compensation to the owner.²

§ 580. **This applies only to replevin.** This rule, allowing the value of the use, is peculiar to the action of replevin. It grows out of the fact that the plaintiff asserts his continued ownership in the property, and seeks to recover the property and not its value. If, as in trover, the value was sought, of course compensation for the use of the property to the party who, by his action, asserts a transfer of title, would be absurd.³ It only applies in cases where the party claiming the use is

¹ *Allen v. Fox*, 51 N. Y. 562; *Morgan v. Reynolds*, 1 Blake, (Mon.) 164; *Carroll v. Pathkiller*, 3 Port. (Ala.) 281; *Hanauer v. Bartels*, 2 Col. 524; *Fralick v. Presley*, 29 Ala. 463; *Clapp v. Walters*, 2 Tex. 130; *Machette v. Wanless*, 2 Col. 180; *Clements v. Glass*, 23 Geo. 395; *Dorsey v. Gassaway*, 2 Har. & J. 402. For a case where the value of the use was not allowable, see *Twinam v. Swart*, 4 Laus. 263. See, also, *Young v. Atwood*, 5 Hun, 234.

² *Williams v. Phelps*, 16 Wis. 85.

³ *McGavock v. Chamberlain*, 20 Ill. 220; *Allen v. Fox*, 51 N. Y. 564.

in a situation to use it, and has a right to use it,¹ and only applies to cases where the property can be put to use. It is for only the loss of the use of property which the party is in a situation to use, and can use, that the value of the use is allowed.

§ 581. **The same.** Not allowed a pledgee or an officer of the law. A mere pledgee of goods has no right to use them. So, when the defendant had a judgment for the return of a sewing machine, on the assessment of damages the defendant claimed to be the owner, and testified as to the monthly value of the use. The plaintiff offered to show that the defendant obtained the machine as a pledge or security for a debt, and this defense was held good, and a judgment for the defendant for the value of the use was reversed;² and, following the analogies of this case, an officer of the law, who has seized property on an execution, has no right to use the property; the value of the use should not be assessed in his favor.³

§ 582. **The same.** Where the property was valuable for use, plaintiff may recover the value of the use during the time he was deprived of it, but not the natural depreciation in value during the same time; though when the property is incapable of use, the natural depreciation in value may be given.⁴ Neither can a party be entitled to interest on the value, and at the same time the value of the use. Where use is allowed it excludes other compensations during the period for which the use is allowed. When a horse was bailed to defendant to feed, and he used it, and it afterwards died, though not in consequence of such use, the plaintiff could not recover for the use, in an action of trover. Perhaps assumpsit for the use might have been proper.⁵

§ 583. **The same.** Not allowed unless the property is chiefly valuable for its use. Where the property is valuable chiefly as merchandise, kept for sale or consumption, and not for use, its

¹ *Barney v. Douglass*, 22 Wis. 464.

² *McArthur v. Howett*, 72 Ill. 359.

³ See, in this connection, *Twinam v. Swart*, 4 Lans. 263.

⁴ *Odell v. Hole*, 25 Ill. 208; *Garrett v. Wood*, 3 Kan. 231.

⁵ *Johnson v. Weedman*, 4 Scam. 496.

value as merchandise, and interest, and not the value of its use, is the proper measure of damages.¹ And generally, the plaintiff can never recover the value of the use unless he shows the property to be valuable only for its use, and that he is in a situation where its use is a matter of right.

§ 584. **Where the successful party has only a limited interest.** Where the successful party in replevin has only a limited interest in the property in dispute, as, for example, a leasehold interest, or a lien for a limited amount, he cannot, as against the general owner, recover damages greater in amount than the value of that limited interest. The justice of this rule is apparent. In a contest between the owner of the general property and the owner of a limited interest in the same property, the rights of each can be defined and protected.² To illustrate: When the interest of the plaintiff was only an execution, and the other party was the general owner,³ or, where the action was by one who had a life estate in slaves against the remainderman, the value of the life interest, and not the full value of the slaves, was allowed.⁴

§ 585. **The same. Distress for rent.** When the suit was for the replevin of a distress for rent, and the tenant failed to prosecute his suit, and a return of the property was awarded, in a suit on the bond, the suit was regarded as between the owner of a limited interest against the owner of the general title; the measure of damages was only the value of the limited interest; that is, the amount of rent due, and not the full value of the property replevied.⁵ So, when the defendant in the replevin had not paid for the goods, and could not be held liable to pay for them, he could not recover on the

¹ *Hanauer v. Bartels*, 2 Col. 515; *Machette v. Wanless*, 2 Col. 170; *Shepherd v. Johnson*, 2 East, 211; *Clark v. Pinney*, 7 Cow. 681; *Goulet v. Asseler*, 22 N. Y. 225; *Bonesteel v. Orvis*, 22 Wis. 522; *Allen v. Fox*, 51 N. Y. 564.

² *Townsend v. Bargy*, 57 N. Y. 665; *Weaver v. Darby*, 42 Barb. 411; *Warner v. Hunt*, 30 Wis. 200; *Childs v. Childs*, 13 Wis. 19; *Lloyd v. Goodwin*, 12 S. & M. (Miss.) 223; *Williams v. West*, 2 Ohio St. 86; *Rhoads v. Woods*, 41 Barb. 471; *Allen v. Judson*, 71 N. Y. 77.

³ *Booth v. Ableman*, 20 Wis. 22.

⁴ *Lloyd v. Goodwin*, 12 S. & M. (Miss.) 223.

⁵ *David v. Bradley*, 79 Ill. 316.

bond any more than the jury may find they would have gained by the sale of the goods if he had retained them.¹

§ 586. **The same.** Where the interest is an execution. Where the interest of the plaintiff was only an execution against the defendant, or a lien on the property, the damages should be limited to the amount of the execution or lien, and the defendant may show that it is paid or discharged in mitigation of damages, and the burden of showing the amount of the execution, where it is relied upon, is on the party who relies on it.²

§ 587. **The same.** As between the owner of a limited interest and an intruder. But where the contest is between the owner of a limited interest in a chattel and an intruder, who has no interest in the property, the owner of the limited interest is entitled to recover the property, or its full value; because he may be liable to account to the general owner.³ Where the suit is brought by a bailee, or one holding a special property, against the holder of the general title, he recovers the value of his special interest, and not the value of the property. Thus, if one hire a horse for a term, and it be taken from him by the owner, before the term expires, he could recover the value of his interest, and not the full value of the horse.⁴ The same rule prevails when the party connects himself with the general owner as bailee, or in any way showing himself responsible to the general owner, he is entitled to recover the full value as against any one who, without right, interferes with the property.⁵

§ 588. **The same.** Between the general owner and the owner of a limited interest. The general rule may be stated, that in an action between the general owner and one having a lien or

¹ *Seldner v. Smith*, 40 Md. 603.

² *Booth v. Ableman*, 20 Wis. 21; *Seaman v. Luce*, 23 Barb. 240.

³ *Frei v. Vogel*, 40 Mo. 150; *Dilworth v. McKelvy*, 30 Mo. 150; *Falon v. Manning*, 35 Mo. 271; *Frey v. Drahos*, 7 Neb. 194.

⁴ *White v. Webb*, 15 Conn. 305; *Faulkner v. Brown*, 13 Wend. 64; *Ingersoll v. Van Bokkelin*, 7 Cow. 670; *Atkins v. Moore*, 82 Ill. 240; *Rhoads v. Woods*, 41 Barb. 471; *Davidson v. Gunsolly*, 1 Mich. 388; *Benjamin v. Stremple*, 13 Ill. 468; *Battis v. Hamlin*, 22 Wis. 669.

⁵ *Booth v. Ableman*, 20 Wis. 21; *Leonard v. Whitney*, 109 Mass. 266.

a limited interest, when the latter prevails he is entitled to damages the amount of his lien, or value of his special property;¹ but as agent, a stranger who replevins property without right, the defendant, no matter if his interest be limited, is entitled to a return of the goods, or their full value. This rule is shown to be very ancient in *Lyle v. Barker*, 5 Binn. (Pa.) 458, which was an action against the sheriff for trespass in breaking the plaintiff's close and taking pipes of wine. The wine belonged to one Morris, but was held by the plaintiff as collateral for money lent, and the court allowed the full value, for the reason, that upon payment of his claim, the plaintiff was liable to surrender the wine or pay the full value.

§ 589. **The same.** When the plaintiff's title is legally divested after suit brought, and before trial, he can, as against the owner, recover nothing beyond costs, and such damages as he may have sustained up to the time his title was divested;² and the court will always hear evidence to show a change of ownership since the suit began, or which makes it improper to award a return, or full value as damages for a failure to make return.³ And where a return has been awarded, and the suit is on the bond, the defendants may show any fact not settled in the replevin suit in mitigation of damages; but as against a trespasser, the defendant is entitled to a return of the goods, or their full value, notwithstanding his title may have terminated before trial. So, when a pawnee of property is liable to the owner for goods, he may recover the full value as damages against a stranger who takes them.⁴

§ 590. **Damages against officers for wrongful seizure.** Replevin against sheriffs and other ministerial officers for the wrongful seizure of goods is of frequent occurrence, and the question of damages to be awarded against officers in such cases, or in their favor, when they are entitled to the return of the goods, forms an important part of the chapter on damages. The

¹ *Seaman v. Luce*, 23 Barb. 240; *Rhoads v. Woods*, 41 Barb. 471; *Ingersoll v. Van Bokkelen*, 7 Cow. 681, n. a.

² *Cole v. Conolly*, 16 Ala. 271.

³ *Leonard v. Whitney*, 109 Mass. 266.

⁴ *Lyle v. Barker*, 5 Binn. 459.

law is well settled, that sheriffs and other ministerial officers are liable in damages for the wrongful seizure of goods under process. The form of the action, however, may be trespass, trover, or replevin, at the election of the party injured. Thus, if the sheriff, with an execution against A., seize the goods of B., B. may sustain an action against the sheriff for the goods, or their value; and if the goods are sold, or are not returned, he may recover the value. The value, and not the amount for which they were sold, is the measure of damages.¹ Though when the sheriff seize and sell goods, and the plaintiff is an assignee, who must have sold them had they come to his possession, the jury may be induced to find the sum for which the sheriff sold them.²

§ 591. **The same. Against officer acting in good faith.** As against a sheriff acting in good faith in the discharge of his official duties, exemplary damages are not allowed. Even though he should seize and sell the goods of the wrong person, the value of the interest of the party in the property (not including loss of trade or character,) with interest, and reasonable compensation for any depreciation in the value, or cost of replacing it, is the proper measure of damages.³ In *Saffell v. Wash*, 4 B. Mon. (Ky.) 93, it was said that the sheriff was not liable for costs when he levied on exempt property. That a defendant in execution should not be allowed to resort to this interdicted remedy (replevin,) even for his exempt property, except at the certainty of paying all the costs. But this is contrary to the entire current of the law in other States, and the principle would, if allowed to become established, turn loose upon society a set of licensed trespassers.⁴

§ 592. **The same. Officer acting with malice.** When, however, the sheriff has acted with malice or fraud, or with design

¹ *Pozzoni v. Henderson*, 2 E. D. Smith, 146; *King v. Orser*, 4 Duer. (N. Y.) 431; *Livor v. Orser*, 5 Duer. 501; *Whitaker v. Wheeler*, 44 Ill. 441; *Russell v. Smith*, 14 Kan. 374.

² *Whitehouse v. Atkinson*, 3 Car. & P. (14 E. C. L.) 344.

³ *Beveridge v. Welch*, 7 Wis. 45; *Barney v. Douglass*, 22 Wis. 464; *Graves v. Sittig*, 5 Wis. 219; *Morris v. Baker*, 5 Wis. 389; *Meshke v. Van Doren*, 16 Wis. 320; *Noxon v. Hill*, 2 Allen, 215.

⁴ See *post*, § 592.

to annoy or oppress, the process will not protect him more than if he were a private person.¹ But malice on the part of the plaintiff whose process the sheriff is executing cannot be given in evidence against the sheriff.² So, when the sheriff levies an attachment on goods not the property of the defendants,³ he acts at his peril, and is answerable, if he makes a mistake;⁴ and in such case it is no ground for new trial that the jury fix the damages at a greater or less sum than any of the witnesses fix them.⁵ If the sheriff make an excessive levy, after satisfaction of the debt by sale of part of the goods, and a return of part only of the unsold goods, the value of the goods not returned, and damages for their detention, and for any injury they may have received, is proper.⁶

§ 593. **The same.** Where the suit is by the general owner. Where the goods were replevied from an officer, who held them on several attachments, by a party having no right to them, the officer was entitled to the full value and damages (interest) for the detention. Nor should any deduction be made for attachments which were levied after the replevin.⁷ This rule grows out of the fact that the sheriff making a levy is regarded as responsible to the defendant in execution for any surplus there may be after satisfying the execution. Where, therefore, the defendant in the execution replevies the goods, he is regarded as the general owner, and as against him the sheriff is not responsible to any other person for any surplus after satisfying the execution. The measure of damages, therefore, in such cases, is the amount of the execution, in case it is less than the value of the property, or the value of the property in case the execution is greater,⁸ as the damages

¹ *Nightingale v. Scannell*, 18 Cal. 315; *Noxon v. Hill*, 2 Allen, 215; *McDaniel v. Fox*, 77 Ill. 345.

² *Nightingale v. Scannell*, 18 Cal. 315.

³ *Milburn v. Beach*, 14 Mo. 105.

⁴ *Ayer v. Bartlett*, 9 Pick. 156; *Joyal v. Barney*, 20 Vt. 155.

⁵ See note to *Ayer v. Bartlett*, 9 Pick. 156, citing many cases.

⁶ *Waterbury v. Westervelt*, 5 Seld. (N. Y.) 598.

⁷ *Farnham v. Moor*, 21 Me. 508; *Lyle v. Barker*, 5 Binn. 459.

⁸ *Jennings v. Johnson*, 17 Ohio, 154; *Sutcliffe v. Dohrman*, 18 Ohio, 186; *Battis v. Hamlin*, 22 Wis. 669. See *Coe v. Peacock*, 14 Ohio St. 187; *Niagara Elev. Co. v. McNamara*, 2 Hun. 416; S. C. 50 N. Y. Ct. Appeals, 653.

should not exceed the value of the property, possibly with interest added.

§ 594. **The same. Where the suit is by one without right.** But where a party not the defendant in execution replevies the property, and upon trial a return to the sheriff is awarded, in such case the sheriff is regarded as responsible to the general owner for the surplus, and the measure of damages is the full value of the property and interest, without regard to the amount of the execution.¹

§ 595. **Damages against officer for losing bond.** Where the officer has lost the bond, the defendant for whose benefit the bond was given may have his action the same as though no bond had been taken, and may recover the amount for which the securities in the bond would have been liable.² The principle governing in such case is that the party is entitled to be placed in as good a position as if the sheriff had done his duty, and the damages in such case are measured, not by the amount of the value of the goods or the defendant's interest in them, but the amount which could have been recovered if the breach of duty had not happened.³

§ 596. **The same. For other failure in his duty.** If the sheriff fail of his duty, whereby a party is injured, he is usually responsible in damages. If on recovering a writ of replevin the officer fail or neglect to serve it, or if in attempting to serve it he is put off with vague information in reply to casual inquiries, he is responsible to the party for such damages as he may have sustained by such misconduct;⁴ but the sheriff may negative the possibility of any advantage to the creditor from the performance of his duty, and the cred-

¹ *First Nat. Bank v. Crowley*, 24 Mich. 499; *Farnham v. Moor*, 21 Me. 508; *Buck v. Remsen*, 34 N. Y. 383; *Dilworth v. McKelvy*, 30 Mo. 150; *Long v. Cockrell*, 55 Mo. 93; *Fallon v. Manning*, 35 Mo. 275. See *Battis v. Hamlin*, 22 Wis. 669; *Lyle v. Barker*, 5 Binn. 458.

² *Perreau v. Bevan*, 5 B. & C. 284.

³ *Aireton v. Davis*, 9 Bing. 740. In an action for not arresting on *mesne* process, or permitting a debtor to escape, a plea by the officer *negating* any damage is a good plea. *Williams v. Mostyn*, 4 Mees. & W. 145, overruling *Barker v. Green*, 2 Bing. 317.

⁴ *Hinman v. Borden*, 10 Wend. 367.

itor will not be entitled to damages.¹ Thus when the plaintiff delivered to the sheriff a writ directing him to take certain goods of the party therein named as defendant therein; to a suit for false return for not levying, the sheriff was permitted to show that the goods were not the goods of the party against whom the writ issued.²

§ 597. **In suits between different officers.** Suits are sometimes brought by one officer against another to test the relative priority of the different processes held by them. In such cases the rule, as laid down in a case in Vermont, is, that damages beyond the actual value of the property should not be given.³

§ 598. **Damages between joint owners.** Replevin, as we have seen, cannot be sustained by one joint owner against his co-tenant; but such actions are sometimes brought through mistake or by design, and the question arises, what damage shall be awarded against the plaintiff, who, though he may be a joint owner in the property, and equally entitled to possession with the defendant, must fail in his action. As a general rule the defendant who recovers because of the joint tenancy is entitled to be restored to the same position he was before the taking upon the writ, and is, therefore, entitled to judgment for a return, otherwise the plaintiff would gain all the advantage of a victory where the law compels a defeat. But when in such case the court comes to determine the question of damage, the defendant is not entitled to recover more than the value of his interest in the goods.⁴

§ 599. **The same.** Where the plaintiff's claim for delivery under his writ is based upon the assumption that he is entitled to possession of, and he obtains delivery of, the whole, he must, upon failure, return the whole. Where the action was brought by a stranger against a bailee of one joint owner, to

¹ Mayne's Law of Damages, this title, where this question is fully and ably discussed.

² *Stimson v. Farnham*, 1 Moaks, (Eng.) 60.

³ *Goodman v. Church*, 20 Vt. 187.

⁴ *Bartlett v. Kidder*, 14 Gray, (Mass.) 449; *Witham v. Witham*, 57 Me. 448; *Spoor v. Holland*, 8 Wend. 445; *Jones v. Lowell*, 35 Me. 538; *Ingersoll v. Van Bokkeliu*, 7 Cow. 670; *Mason v. Sumner*, 22 Md. 312; *Sutcliffe v. Dohrman*, 18 Ohio, 185. See, also, *Reynolds v. McCormick*, 62 Ill. 412.

whom the defendant is answerable for the return of the goods or their value, the damages must be the full value, and not the value of the interest of the bailor.¹

§ 600. **Effect of the death or destruction of the property.** Questions frequently arise as to what effect the death, or destruction of the property pending the suit, will have on the rights of the parties; upon this question, the authorities with a few exceptions, can easily be harmonized. It was said in a New York case, that when the property sued for is a living animal, and it dies, it is a good plea to say that it is dead.² This ruling was based upon the idea that the return had become impossible, by act of God;³ but this ruling has been questioned more than once. To permit a defendant who wrongfully takes possession, to claim that he holds it at the risk of the real owner and not at his own, and claim immunity for accident, would be unjust, in the extreme. The wrongful taker of property, when called upon to surrender it to the rightful owner or pay the value, cannot defend himself from judgment by showing his inability to deliver through death or otherwise.⁴ If the recovery of the specific thing was the sole object of the action, of course upon its death or destruction the action would terminate; but the object is to recover the thing only in case it can be had, and its alternate value in case it cannot be delivered in specie. The result is, that the death or destruction of the thing sued for, does not defeat the action unless it be under circumstances which excuse the party from liability for the value.⁵

§ 601. **The same.** If in the action of replevin or detinue, the judgment for the delivery of the property or its alternate value, is to be prevented by its death or destruction pending the suit, it is obvious that that form of action is inadequate to redress the wrong or enforce the right to its full extent.

¹ *Russell v. Allen*, 3 Kern. (N. Y.) 178.

² *Carpenter v. Stevens*, 12 Wend. 589.

³ See *Melvin v. Winslow*, 1 Fair. (Me.) 397.

⁴ *Caldwell v. Fenwick*, 2 Dana, 333; *Haile v. Hill*, 13 Mo. 612; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 34; *Austin's Ex'rs v. Jones*, 1 Gilmer, (1 Va.) 341; *Scott v. Hughes*, 9 B. Mon. 104.

⁵ *Carrel v. Early*, 4 Bibb. (Ky.) 270.

The plaintiff must yield his desire to obtain the specific property, or he must incur the peril of losing not only the property, but all claim for compensation in case it die in the hands of the wrongful taker.¹ Therefore, in such cases, when the property has been destroyed and cannot be delivered or returned, the fact of its destruction does not furnish any excuse for the non-payment of the value. The New York cases referred to were based upon the hypothesis that the party came rightfully into the possession, and was liable only for ordinary care. All the analogies in cases where the taking was wrongful are different.²

§ 602. **The same. Death of slaves pending suit does not affect the right to judgment for value.** The death of slaves pending the action for them has often been held not to defeat the plaintiff's right to a judgment for them or their value.³ In *Carrel v. Early*, 4 Bibb. (Ky.) 270, the proposition was that the slaves having died without fraud of defendant after suit begun, defeated plaintiff's right to their value. C. J. BOYLE said, "this proposition cannot be maintained. Were the recovery of the specified thing the absolute and sole object of the action of detinue, the destruction of the thing would necessarily defeat the action; but as the object is to recover the thing only upon condition it can be had, and if not then its value, it follows that the action cannot be defeated by the destruction of the thing unless under circumstances which would excuse the defendant from responsibility. He who wrongfully detains the property of another does so at his peril, and will be responsible to the owner,"⁴ though the prop-

¹ See *Suydam v. Jenkins*, 3 Sandf. 644; *Middleton v. Bryan*, 3 Maul. & S. 158.

² *Garrett v. Wood*, 3 Kan. 231; *Berthold v. Fox*, 13 Minn. 501.

³ *White v. Ross*, 5 Stew. & Porter, (Ala.) 123; *Lay v. Lawson*, 23 Ala. 377; *Bettis v. Taylor*, 8 Por. (Ala.) 564; *Bell v. Pharr*, 7 Ala. 807; *Johnson v. Marshall*, 34 Ala. 523; *Carrel v. Early*, 4 Bibb. 270. Action not proper if slave died before suit began. *Caldwell v. Fenwick*, 2 Dana, (Ky.) 332; *Barksdale v. Appleberry*, 23 Mo. 390. Value of use to the time of death. *Halle v. Hill*, 13 Mo. 612; *Austin v. Jones*, 1 Va. 341; *Bethea v. McLennon*, 1 Ired. (N. C.) 523; *Rose v. Pearson*, 41 Ala. 689.

⁴ *Barksdale v. Appleberry*, 23 Mo. 392; *Rose v. Pearson*, 41 Ala. 692; *Feagin v. Pearson*, 42 Ala. 335.

erty should be destroyed by accident, or taken from him by malice."

§ 603 **The same. Emancipation.** It has also been held that where slaves had become emancipated before the trial, that fact furnished no reason why the plaintiff should not have judgment for their value, (suit begun in March, 1852, tried in 1869.)¹

§ 604. **Judgment when the property is lost or destroyed.** When it appears that the property was hopelessly lost or destroyed, so that judgment for its return would be of no avail, a failure to render judgment for the return was regarded as a technical error, and judgment for the value was not disturbed.²

§ 605. **Damages allowed only where the defendant is entitled to a return.** The defendant is never entitled to damages unless he shows himself entitled to the property. Damages are in fact only an incident to judgment for a return, which should not be given unless the defendant plead and show some right or title in himself.³ Damages to a defendant are to compensate him for the loss he has sustained by being deprived of his property, and their award involves a prior finding that the property belongs to the defendant. It would be a violation of all the principles of the law to give damages to one who had no right to the property, and could not show himself entitled to a return.⁴

§ 606. **Option of the defendant to pay value or return the goods; where allowed.** In some of the States it is at the option of the defendant in replevin to return the goods or pay the value as assessed by the jury;⁵ but the contrary is the more common doctrine, but this is a purely local regulation.⁶

§ 607. **Damages to compel return.** It not unfrequently happens that the defendant makes some disposition of the property to defeat the writ of return, and contents himself with paying the alternate judgment for the value. In case the goods have

¹ *Wilkerson v. McDougal*, 48 Ala. 518. See *McElvain v. Mudd*, 44 Ala. 48.

² *Brown v. Johnson*, 45 Cal. 76; *Wilkerson v. McDougal*, 48 Ala. 518.

³ *Whitwell v. Wells*, 24 Pick. 25.

⁴ *Neis v. Gillen*, 27 Ark. 184.

⁵ *Allen v. Fox*, 51 N. Y. 569.

⁶ *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 121.

an intrinsic value, above the market value, or a value to the parties, or one of them, greater than the market value, the disposition to keep them and pay the value may lead the party to adopt such a course as this; but where the goods have a peculiar value which makes their return important to the defendant, the jury in a proper case will be warranted in fixing the value at such a sum as will be likely to compel their return.¹ So where the plaintiff sued for specified chattles, which had a peculiar value to him, the jury, with the view of inducing a surrender of the specific goods, placed a value on them higher than would otherwise have been warranted by the evidence, the verdict was allowed to stand.² This rule, highly advantageous where it appears that the party to whom such damages are awarded is clearly in the right, is liable to abuse, and such damages should never be allowed in any case unless it appears that the party has the property and can deliver, and that the increase in damages may result in producing a delivery, which ought to be made, and will otherwise be refused.

§ 608. **When and how assessed.** The damages should be assessed in the replevin suit. They are but an incident to the proceeding in replevin, and to prevent a multiplicity of suits, questions touching the damage should be settled in the replevin suit.³ In Missouri, when the judgment is against the plaintiff, it is against him and his securities that they return the property or pay the value, with damages and costs. The jury, therefore, which tries this issue touching the replevin should pass upon the issues as to damages. They should find the value which the plaintiff and his security must pay in case they fail to return the property, and should assess the damages. There is no warrant of law to call a jury to try part of the case and another part of the case.⁴ This rule is, however, by

¹ *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 120; *Goodman v. Floyd*, 2 Humph. (Tenn.) 60.

² *Cochran v. Winburn*, 13 Tex. 143. But see, in this connection, *Hoeser v. Kraeka*, 29 Tex. 450.

³ *Hohenthal v. Watson*, 28 Mo. 360; *White v. Van Houten*, 51 Mo. 578; *Bower v. Tallman*, 5 W. & S. (Pa.) 556; *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32; *Glann v. Younglove*, 27 Barb. 480.

⁴ *Hohenthal v. Watson*, 28 Mo. 360.

no means universal. In Iowa, the damages might be recovered in the replevin suit or in a separate action on the bond.¹ In Maine, a similar rule obtained.²

§ 609. **Generally dependant on local statute.** This question however depends on the statutes of the different States. No general rule can be stated. By the common law, upon an omission to have damages assessed in the replevin suit, the defendant was entitled to have a writ of inquiry,³ and unless the condition of the bond or some statutory prohibition exists, such course would be permitted now. When the condition of the bond is to pay such damages as shall be adjudged, the only safe course is to have the damages assessed in the replevin suit.⁴ In Indiana, the plaintiff in a suit on the bond is permitted to recover even though damages were not assessed in the replevin.⁵ In Illinois, the securities are not parties to the replevin suit, and evidence of the assessment of damages in the replevin suit is not admissible against them in suit on the bond.⁶

§ 610. **Value and damages should be separately assessed.** The value of the property and the damages for detention, etc., should be separately assessed, and in no case should they be amalgamated.⁷ The force of this will be apparent when it is considered that the claims for value and for damages are based upon entirely different grounds. Value is only allowed when the property cannot be had; damages are to compensate the party for being deprived of his property; but by agreement of the parties the value and damages may be assessed in one sum.⁸

§ 611. **Recovery cannot be for a greater sum than is claimed.** The damages stated in the writ or in the *narr* is not fixed with

¹ Hall v. Smith, 10 Iowa, 45.

² In Washington Ice Co. v. Webster, 62 Me. 363, it was said that in case of a non-suit, without assessment of damages, that they might be assessed in suit on the bond.

³ Humfrey v. Misdale, Comb. 11; Herbert v. Waters, 1 Salk. 205.

⁴ Pettygrove v. Hoyt, 11 Me. 66; Sopris v. Lilley, 2 Col. 498.

⁵ Whitney v. Lehmar, 26 Ind. 506; Hall v. Smith, 10 Iowa, 47.

⁶ Shepard v. Butterfield, 41 Ill. 78. See this case.

⁷ Sayers v. Holmes, 2 Coldw. (Tenn.) 259.

⁸ M'Cabe v. Morehead, 1 W. & S. (Pa.) 515.

any very nice attention to the actual value. The pleader will usually take good care to fix it at the outside value, on the supposition that the jury would not give him any greater sum than the value as fixed by himself.¹ In California the right to a return must be determined in the first instance in the replevin suit, but if that is dismissed without trial the parties are left to the remedy on the bond.² The rule in this action, as in trover, does not confine the jury to the damages which were sustained prior to the date of the writ, but the injury may be continued up to the date of the trial,³ the same as interest is computed upon a promissory note up to the date of the verdict or judgment.

§ 612. **Damages for property severed from real estate.** When the owner of real estate sues in replevin for property which has been severed therefrom he can recover only the value of the property after the severance; not its value as forming part of the real estate. The reason for this rule will be apparent when it is considered that the plaintiff sues for his property as his chattel, not as his realty. He had his election to sue in trespass, in which form he might have recovered the damage to the real estate; but having elected to treat it as chattel property he can only recover its value as a chattel. Thus, when a fence was removed from a farm, and the owner replevied it, proof that it was worth \$200 as a fence, but the materials when removed were worth only \$75, the plaintiff could only recover the value of the materials.⁴

§ 613. **The same.** When the suit was for rails, and before the service of the writ the defendant built part of them into a fence, the sheriff could not take the fence, and the plaintiff could recover the value of the rails, not the value of the fence.⁵ So a tenant who was dispossessed for non-payment of rent, and prevented from taking a chimney which he had the right to take, which could not be removed without taking down, the

¹ *Hoskins v. Robins*, 3 Saund. 320, n. 1; *Huggefords v. Ford*, 11 Pick. 223. The plaintiff cannot recover a greater sum than he has claimed in his declaration. *O'Neal v. Wade*, 3 Ind. 410.

² *Mills v. Gleason*, 21 Cal. 274; *Ginaca v. Atwood*, 8 Cal. 446.

³ *Dailey v. Dismal Swamp*, 2 Ired. (N. C.) 222.

⁴ *Pennybecker v. McDougal*, 48 Cal. 162.

⁵ *Bower v. Tallman*, 5 W. & S. (Pa.) 561.

value of the material unincumbered by any obligation to remove it was proper measure of damages.¹

§ 614. **The same. Coal dug or timber cut.** Another class of cases arises where the property has, by its severance from the realty, been increased instead of diminished in value; of which coal dug from the mine of another, or timber cut from his land, furnish common instances. The severance does not change the title to the property. The owner may sustain replevin, but the question of damages to be given him in case he does not recover the property in specie is one of more difficulty. In England when the action was trespass for taking coal, the value was estimated at the value when severed from the realty, and not when in the mine.² In Illinois, after a full consideration of the authorities, the court followed substantially the rule in *Martin v. Porter*, 5 Mees. & W. 353, and gave the value at the mouth of the pit, less the cost of carrying it there, allowing nothing for the digging.³

§ 615. **The circumstances under which the severance was made, and the form of the action, material to be considered.** The circumstances under which the property was taken constitute a material element in determining damages in such case. In a case of trover the jury were told that if there was fraud or negligence on the part of the defendant they might give the full value of the coal after the removal; but if the defendant acted under the honest belief that he had a right to dig as he did, value of the coal in the mine was the proper damages, as an award of the value of the coal before removal will fully compensate the plaintiff for all the damage he has sustained.⁴ This case of *Forsyth v. Wells* was considered in *Ill. & St. L. R. R. and Coal Co. v. Ogle*, 82 Ill. 627, but the court followed *Morgan v. Powell*, 3 Adolp. & Ellis, 278, (43 Eng. Com. Law, R. 734,) which was trespass for digging plaintiff's

¹ *Moore v. Wood*, 12 Abb. Pr. R. (N. Y.) 393.

² *Martin v. Porter*, 5 Mees. & W. 353; *Wild v. Holt*, 9 Mees. & W. 672; *Morgan v. Powell*, 3 Adolp. & E. (43 E. C. L.) 278.

³ *Ill. & St. L. R. R. and Coal Co. v. Ogle*, 82 Ill. 627; *Robertson v. Jones*, 71 Ill. 405; *McLean Co. Coal Co. v. Long*, 81 Ill. 359.

⁴ *Forsyth v. Wells*, 41 Pa. St. 291; citing *Wood v. Morewood*, (43 E. C. L.) 3 Adolp. & E. 440.

coal, where the court held that the plaintiff might recover the value of the coal when dug, allowing the defendant nothing for the digging, but if the defendant had moved the coal to the mouth of the pit he should be paid for his labor in so doing. But in that case PATTERSON, J., said, in substance, if the plaintiff had brought trover or detinue for the coal after it was brought to the pit's mouth he might have recovered the value which it then had without deduction. But this action was trespass for taking and detaching the mineral from the freehold, and the value must be regarded as attaching at the moment the trespass was committed. If the defendant put any expense on the coal after the first trespass it could not be recovered in this action. It would, therefore, seem that when the form of the action is replevin or trover, and not trespass, the rule laid down in *Forsyth v. Wells*, 41 Pa. St. 291, would be proper, rather than the exceedingly technical rule laid down in *Morgan v. Powell*, *supra*. In trover for the conversion of logs by mistake, the court held the measure of damages should be a sum sufficient to compensate the party for the injury he had sustained,¹ and, except in cases where punitive damages are proper, or where nominal damages are sufficient, this rule is the only just theory.² In the case of *Winchester v. Craig*, above referred to, the court most aptly illustrates the law in this case, by supposing a party cut trees by mistake and ships them a short distance; and another, under similar circumstances, cut timber and ships it to Europe. In separate actions against each the plaintiff claims the value at the place where the timber was sold. It is very evident that though the value of the standing timber was the same in each case, and the actual injury to the plaintiff the same in both cases, the verdict, if this recovery was allowed, would be very different, and he who had spent the most time and money in giving the timber any real value would be punished most, under no pretense of compensating the plaintiff.

§ 616. **Trees cut upon the land of another by mistake.** When trees are cut on the land of another by mistake, the

¹ *Winchester v. Craig*, 33 Mich. 206; *Northrup v. McGill*, 27 Mich. 238.

² *Winchester v. Craig*, 33 Mich. 206.

value of the trees cut down is given as the measure of damages, as the severance changes the property from real to personal property, but in no way changes the ownership. The value at the time of the severance is regarded as a just compensation.¹ In a suit for cutting timber, the form of the action being *trespass de bonis asportatis*, the logs being hauled to a certain landing; but the court allowed only the value at the place where they were cut, though in trover the value at the place where found might have been allowed.² But there are other cases where the court allowed the value less the value of the labor of cutting, which was deducted.³ When the taking was by a willful trespasser, the rule is different; thus, where a trespasser cut wheat on another's land, he cannot deduct for the labor of cutting, but must give the owner the value of the wheat, as though he had harvested it himself.⁴ When A. employed a builder to furnish materials and build a house on his lot, and was to pay for it by conveying another lot, the builder, fearing loss, sold the house to a person, who moved and placed a foundation under it on his own lot. A. sued the purchaser and builder in replevin. *Held*, that the house had become real estate, and that the plaintiff was entitled to the value.⁵

§ 617. The general rule stated applicable to various changes in the property. The rule has been stated with much force and clearness as follows: When the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, willful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If the raw material has, after appropriation, and without such wrong, been changed by manufacturer into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the

¹ *Martin v. Porter*, 5 Mees. & W. 353; *Morgan v. Powell*, 3 Adolp. & E. (48 E. C. L.) 278; *Winchester v. Craig*, 33 Mich. 206.

² *Cushing v. Longfellow*, 26 Me. 307.

³ *Hungerford v. Redford*, 29 Wis. 345; *Young v. Lloyd*, 65 Pa. St. 204; *Single v. Schneider*, 24 Wis. 299; *Herdic v. Young*, 55 Pa. St. 176.

⁴ *Bull v. Griswold*, 19 Ill. 631.

⁵ *Reese v. Jared*, 15 Ind. (Harrison,) 142.

action, or limits the recovery to the value of the original articles.¹ But when the defendant has been guilty of any force or fraud to wrongfully deprive the plaintiff, the rule, as stated, does not apply, and the law gives the owner the entire property, without deduction for the increased value which the trespasser's labor has given it.² The intention of the law, in all these cases, is to do justice to the parties. Where a trespasser takes the timber of another, and cuts it into wood, and burns it, or where he takes cattle, which the owner prizes highly, and butchers them, the law cannot restore the cattle or the wood; it cannot fully and completely protect, or compensate for the injury. It can, however, approximate to it; but because a wrong has been done to the plaintiff, it will not mend the matter to inflict another wrong on the defendant. The law rather aims to protect the plaintiff, but at the same time to inflict no unnecessary injury on the defendant.³

§ 618. **Vindictive damages; when allowed.** In cases where the taking or subsequent detention is accompanied by any act showing malice or fraud, or that it was done for the purpose of oppression, or in willful disregard of the rights of the other party, the law abandons the rule of compensation, and allows exemplary damages, such as will not only compensate the party injured, but such other and additional amount as will serve as a lesson to him in the future, or shall punish him for the wrong committed.⁴

§ 619. **The general principles.** The rules governing cases of vindictive or exemplary damages in replevin is ably discussed in the case of *Whitfield v. Whitfield*, 40 Miss. 367. The

¹ *Silsbury v. McCoon*, 6 Hill, (N. Y.) 425.

² *Silsbury v. McCoon*, 3 Comst. 381.

³ *Warren v. Cole*, 15 Mich. 271, citing many cases.

⁴ *Cable v. Dakin*, 20 Wend. 172; *Brizsee v. Maybee*, 21 Wend. 144; *Dorsey v. Manlove*, 14 Cal. 553; *Whitfield v. Whitfield*, 40 Miss. 366; *Davenport v. Ledger*, 80 Ill. 574; *Mitchell v. Burch*, 36 Ind. 535; *Biscoe v. McElween*, 43 Miss. 556; *Jamison v. Moon*, 43 Miss. 598; *M'Cabe v. Morehead*, 1 W. & S. (Pa.) 516; *Taylor v. Morgan*, 3 Watts. (Pa.) 334; *Landers v. Ware*, 1 Strob. (S. C.) 15. For a statement of the distinction between compensating and vindictive damages, see *Hendrickson v. Kingsbury*, 21 Iowa, 379; *Graham v. Roder*, 5 Tex. 141; *Cole v. Tucker*, 6 Tex. 266. Timber cut into boards, the enhanced value. *Baker v. Wheeler*, 8 Wend. 506.

rule there laid down is, that where the original taking was wrongful, or where the original taking was *bona fide*, but the subsequent detention, sale or disposition of the property, after a knowledge of the plaintiff's right, was in willful disregard of such right, or when the original taking and subsequent disposition of the property at a price greater than its market value at the time of taking, were all in ignorance of the plaintiff's rights, but the defendant, after knowledge, seeks to retain the difference, as a speculation resulting from his original wrong; or, when the property has some peculiar value to the plaintiff, and is willfully withheld, in all such cases it is the peculiar province of the jury to fix such damages as will be consonant with right, not as a matter of law, but of remedial justice, resting with the jury.¹

§ 620. **The same.** The meaning of the terms "punitive," "exemplary" and "vindictive." This rule of exemplary damages finds illustration in many cases, the general principle being the same in all, that where the taking was accompanied by any evident design to annoy, harass, oppress or insult, the jury may give such damages as will fully compensate the injured party for his actual losses, and in addition thereto such sum, as from all the circumstances of the case, seems just.

¹ This question is treated at length in Sedgwick on Meas. of Damage, 6th Ed., p. 544. See, also, *Herdic v. Young*, 55 Pa. St. 176; *Dorsey v. Gasaway*, 2 H. & J. (Md.) 402; *Bruce v. Learned*, 4 Mass. 614; *Carey v. Bright*, 58 Pa. St. 70; *McBride v. McLaughlin*, 5 Watts. (Pa.) 375; 3 B. Mon. 368. See *Farwell v. Warren*, 51 Ill. 467; *Walker v. Smith*, 1 Wash. C. C. 152. The question of punitive damages is exhaustively discussed in *Fay v. Parker*, 53 N. H. Rep. 343. The conclusion reached in that case is, that in cases when the action is for a tort, punishable by the criminal law, punitive damages cannot be assessed, as the defendant is liable to criminal punishment; and if punitive damages were permitted, he might be punished twice for the same offense, which is unconstitutional. *Quære*, whether, in any civil action, the plaintiff can recover punitive damages. To the same effect, see *Austin v. Wilson*, 4 Cush. (Mass.) 273; *Tabor v. Hntson*, 5 Ind. 322; *Humphries v. Johnson*, 20 Ind. 190. Compare *Birchard v. Booth*, 4 Wis. 72; *Wilson v. Middleton*, 2 Cal. 54; *Cook v. Ellis*, 6 Hill, 466; *Hoadley v. Watson*, 45 Vt. 289; *McCabe v. Morehead*, 1 W. & S. 513; *Schofield v. Ferrers*, 46 Pa. St. 439. The current of authority justifies the assessment of punitive damages in cases of willful wrong. The rule is liable to great abuse, but its necessity has been made apparent.

The terms punitive damages — *damages to punish* — exemplary damages — damages for example, or to teach the party a lesson for the future — or vindictive damages — are, I conceive, frequently misconstrued. The law does not award any unjust or revengeful damages, but the terms only mean that in such cases compensation for the actual loss of property would not be full compensation for the injury actually sustained, and, therefore, as a matter of justice, the law permits further compensation sufficient not only to make up to the party for all the injury he has sustained, but to prevent the wrong-doer from deriving any profit from his wrongful act at the expense of the other.¹ The terms “punitive” and “vindictive” have become so fixed in the law that they cannot now be got rid of, yet they should never be used without explanation of their true meaning.² The law will not attempt to redress a wrong suffered by the plaintiff by inflicting another wrong on the defendant. In some cases the injuries are such that they are susceptible of a full and definite money compensation. When this is the case the law will not abandon a certain rule which will do complete justice for an uncertain rule which can hardly fail to do injustice.³

§ 621. **The same.** This question of punitive is one of the most difficult which the courts have to deal with, involving as it does a wide departure from the plain principles of the common law, often exposing a suitor to the danger of being heavily punished by what amounts to a fine assessed for the benefit of his opponent. The courts should exercise a most vigilant watch over all cases where such damages are claimed, and promptly suppress any attempt to recover them, except in cases clearly within the rule, and should promptly strangle any attempt to increase the amount of such damages by an appeal to the passion or prejudices of the jury. In no case can court or jury be required to exercise cooler judgment or

¹ *Heard v. James*, 49 Miss. 236; *Wilson v. Young*, 31 Wis. 576; *Selden v. Cashman*, 20 Cal. 57. The terms “punitive,” “vindictive” or “exemplary” damages have no different signification in law. *Chiles v. Drake*, 2 Met. (Ky.) 146; *Brown v. Allen*, 35 Iowa, 306.

² *Detroit Daily Post*, etc., v. *McArthur*, 16 Mich. 452.

³ *Warren v. Cole*, 15 Mich. 271; *Winchester v. Craig*, 33 Mich. 205.

sounder discretion than in the assessment of punitive or exemplary damages.

§ 622. **The same. Actual malice or gross carelessness must be shown.** The principal rule governing such cases is, that malice must appear. The mere doing an unlawful or injurious act is not of itself sufficient to warrant the jury in allowing anything beyond compensatory damages. The act must be shown to be prompted by a malicious motive or criminal indifference to obligations, or done under circumstances or in a manner which indicates such motives.¹

§ 623. **No general rule exists for estimating.** No general rule can be laid down to govern cases of this kind; each case must be controlled by the circumstances which surround it. Where a trespass is committed in a wanton and aggressive manner, indicating malice or a desire to injure, a jury ought to be liberal, but not wanton,² in compensating the party injured in all he has lost in property, and, in some cases, his expense incurred in the assertion of his rights. There is, in such case, no fixed standard as to the amount which should be assessed, the jury being under the law the sole judges, and responsible only for a wise and proper exercise of their judgment.³

§ 624. **Illustrations of the principles.** The following illustrations of the rule will, it is believed, be of material aid in determining how far the courts will incline to go in the direction of vindictive damages: When plaintiff's hogs were found in the defendant's possession under circumstances which justify the inference that he wrongfully took them with the intent to

¹ *Brown v. Allen*, 35 Iowa, 306; *Seeman v. Feeney*, 19 Minn. 79; *Ousley v. Hardin*, 23 Ill. 403; *Selden v. Cashman*, 20 Cal. 57; *Hyatt v. Adams*, 16 Mich. 180. Vindictive damages cannot usually be recovered against a master for the act of his servant, unless he authorized or ratify the act. *Hagan v. Providence & W. R. R. Co.*, 3 R. I. 88; *Wardrobe v. Calif. Stage Co.*, 7 Cal. 118; *Milwaukee R. R. v. Finney*, 10 Wis. 388. Exemplary damages may be found against one of two defendants; but if one of them be innocent of malice or recklessness, such damages cannot be recovered against him. *Becker v. Dupree*, 75 Ill. 167.

² *Detroit Daily Post v. McArthur*, 16 Mich. 447.

³ *Pacific Ins. Co. v. Conard*, 1 Baldwin, (U. S. C. C.) 138; *Strasburger v. Barber*, 38 Md. 103.

convert them to his own use. He knew that the plaintiff was hunting them, but did not tell him where they were. The plaintiff testified that he lost two weeks' time and had to stop his team and hired hand from the plow. The plaintiff was allowed pay for his time spent in hunting his hogs and his necessary expenses, in addition to compensation for the decrease in value which his hogs had suffered while in the defendant's possession.¹

§ 625. **The same.** So when plaintiff's heifer was taken secretly by defendant, he was allowed compensation for the time spent in hunting for her.² When the defendant took the plaintiff's horse and wagon, and four days' time was spent and other expenses incurred in the pursuit, a verdict for the time and expenses was allowed to stand.³ The plaintiff entrusted fifty head of cattle to defendant to feed for the winter, that he might have them ready to work with in the spring, and the defendant shipped twenty of the best and sold them for beef. The cattle were work-cattle when delivered; but the plaintiff was entitled to the value at the time of the sale.⁴ When plaintiff fraudulently sued out a writ of replevin without color of right, and seized the defendant's goods, the jury are warranted in awarding the defendant exemplary damages, as for a willful trespass.⁵

§ 626. **The same.** In *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 624, the court stated the general rule for ascertaining damages in cases of trespass, substantially as follows: "Add to the value of the property where the right of action accrued, such damages as shall cover not only every additional loss which the plaintiff has sustained, but any increase of value which the wrong-doer has obtained, or has in his power to obtain." This general rule, applied to cases where punitive or vindictive damages would be improper, seems to commend itself as emi-

¹ *Mitchell v. Burch*, 36 Ind. 535.

² *Miller v. Garling*, 12 How. Pr. (N. Y.) 203. To same effect, see *McDonald v. North*, 47 Barb. 530.

³ *Bennett v. Lockwood*, 20 Wend. 223.

⁴ *Otter v. Williams*, 21 Ill. 118.

⁵ *Brizsee v. Maybee*, 21 Wend. 144; *M'Cabe v. Morehead*, 1 W. & S. (Pa.) 513; 15 Am. L. Reg. 525.

nently wise and proper. A different conclusion in terms, however, was reached in *Wilson v. Mathews*, 24 Barb. 295 — in which the highest price of the property, at any time after the conversion and before the trial, was regarded as the proper measure of damages.¹

§ 627. **Party who acts in defiance of another's rights is responsible for all consequences.** The action of replevin is an action in the nature of a tort, and when the act is in fact, as well as theory, a trespass, that is, where the taking was in willful defiance of the other party's rights, the party is supposed to act with all the consequences before his eyes, in full contemplation of all the damages which may legitimately follow his act, and so far as damages are plainly the result of his wrongful interference, he is responsible.²

§ 628. **Vindictive damages against officers of the law.** The rules governing the assessment of vindictive damages applies to officers of the law as well as to individuals, in all cases where the officer has acted with malice, or in an unjust or oppressive manner. A contrary doctrine would turn loose on society a set of licensed wrong-doers.³ But the malicious motives of the party whose process the officer is executing, cannot be given in evidence against the officer.⁴

§ 629. **The same.** Where an officer in the *bona fide* discharge of his duty seizes the goods of the wrong person, without any circumstances showing an intent to do a willful injury, the fact of seizure will not authorize exemplary dam-

¹ This case is cited as overruling *Suydam v. Jenkins*, 3 Sandf. 624, Biglow overruled cases. While it does not do so in terms, its conclusions are different. See *West v. Wentworth*, 3 Cow. (N. Y.) 83; *Com. Bank Buffalo v. Kortright*, 22 Wend. 348.

² *Chandler v. Allison*, 10 Mich. 461, where the question is discussed. *Fultz v. Wycoff*, 25 Ind. 321; *Dubois v. Glaub*, 52 Pa. St. 238; *Douty v. Bird*, 60 Pa. St. 48; *Hanover R. R. v. Coyle*, 55 Pa. St. 396; *Simmons v. Brown*, 5 R. I. 299. The rule governing cases of willful trespass is the same substantially in all forms of action. See *ante*, *Heard v. James*, 49 Miss. 236.

³ *Nightingale v. Scannell*, 18 Cal. 315; *Russell v. Smith*, 14 Kan. 374; *Noxon v. Hill*, 2 Allen, 215.

⁴ *Nightingale v. Scannell*, 18 Cal. 315.

ages.¹ When the defendant, as sheriff and tax collector, seized ten horses from a cattle drover, and afterwards returned some of them, the drover proved that the cattle could only be driven by the use of his trained horses, etc., and that the tax warrant was void; but as there were no circumstances showing an intent to do a willful injury, the value of the property and interest only was allowed. The warrant in this case, though void and properly excluded as a justification or defense, was proper evidence to show the good faith of the officer.² In trespass against a sheriff for wrongfully seizing and selling goods, where no circumstances of aggravation appear, the action is regarded as an action of trover, and value only is allowed.³

§ 630. Recoupment and set-off accounts cannot be adjusted in replevin. Accounts cannot be adjusted, nor set-off allowed in the action of replevin or trover.⁴ The nature of actions for tort does not allow an examination into counter claims of indebtedness or damages. This is especially the case in replevin. The plaintiff sued for specific articles, and damages for their wrongful detention, and it is contrary to the spirit of the law to allow an off-set to be investigated in cases of a suit for the recovery of chattels wrongfully withheld.

§ 631. But questions of set-off may be investigated in certain cases. It does not follow, however, that the questions of set-off or recoupment cannot be investigated in replevin. When property is distrained for rent, the plaintiff may show that the landlord failed to keep his covenants to furnish lumber for a fence, and so show damage equal to the rent, and thereby defeat the distress;⁵ but the law does not permit a wrongful taker to set up an account to justify his taking.

§ 632. Illustrations of the rule. When a note is sent to

¹ *Beveridge v. Welch*, 7 Wis. 465; *Phelps v. Owens*, 11 Cal. 25; *Selden v. Cashman*, 20 Cal. 57; *Williams v. Ives*, 25 Conn. 573.

² *Dorsey v. Manlove*, 14 Cal. 555.

³ *Phelps v. Owens*, 11 Cal. 25; *Brannin v. Johnson*, 19 Me. 361.

⁴ *Otter v. Williams*, 21 Ill. 120; *Stow v. Yarwood*, 14 Ill. 427; *Keaggy v. Hite*, 12 Ill. 101; *Streeter v. Streeter*, 43 Ill. 155.

⁵ *Lindley v. Miller*, 67 Ill. 248; *Fairman v. Fluck*, 5 Watts, 516; *Phillips v. Monges*, 4 Whart. 225; *Peck v. Brewer*, 48 Ill. 55; *Peterson v. Haight*, 3 Whart. (Pa.) 150; *Warner v. Caulk*, 3 Whart. (Pa.) 193.

an attorney for collection, and he is sued in trover for the value of the note, he may recoup the value of his services in collecting,¹ under plea of general issue.² Replevin for wheat; the defendant justified the detention on the ground that he had a lien as a warehouseman for storage, and the plaintiff contended that some forty bushels of wheat, equal in value to the storage, were destroyed. *Held*, proper matter for investigation in replevin, and that the damage might off-set or extinguish the lien.³ A lien for freight is a proper matter of recoupment when a carrier is sued in trover for goods lost;⁴ and generally whatever demand the defendant has growing out of the *same subject matter* as the plaintiff's claim, may be recouped.⁵

§ 633. **Set-off to suit upon bond.** Suit on the bond is in the nature of a contract, and set-off or recoupment properly pleaded, may be shown.⁶

¹ *Turner v. Retter*, 58 Ill. 265.

² *Babcock v. Trice*, 18 Ill. 420.

³ *Babb v. Talcott*, 47 Mo. 343.

⁴ *Saltus v. Everett*, 20 Wend. 267.

⁵ *Streeter v. Streeter*, 43 Ill. 155; *Sears v. Wingate*, 3 Allen, 103.

⁶ *Balsley v. Hoffman*, 13 Pa. St. 603.

CHAPTER XIX.

PARTIES.

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§ 634. Parties who may be plaintiff and defendant. The party whose legal rights have been invaded is the proper party plaintiff in all cases, except when he labors under some personal disqualification, such as infancy, insanity, or the like. In replevin the person having the right to immediate and exclusive possession is the proper plaintiff, and the person who has the actual possession is the proper defendant. The action is sometimes permitted against one who has had possession of the property and has made way with it. The exceptions to the general rule have been stated.¹ Where the supervisor of a township is required by law to keep and preserve all books and papers belonging to his office, he may maintain replevin for such books or papers against any one who assumes to take them.² There appears to be no authority for allowing a stranger who claims an inter-

¹ See *ante*, §§ 145 and 146.

² *Phenix v. Clark*, 2 Gibbs, (Mich.) 327.

est in the property to come in and be made a party, and have his rights litigated, though such course would not violate any principle of the law. An independent replevin suit against the plaintiff in possession has been allowed. This rule has been carried so far that when goods are replevied from an agent or bailee, the owner, if a stranger to the suit, has been allowed an independent replevin suit against the plaintiff in the first suit, and not driven to appear and defend the suit against his agent.¹

§ 635. **Owners of distinct interests cannot be joined; joint owners must be.** The action cannot be sustained by joining several parties owning several and distinct interests. The interests of all when aggregated may amount to the entire property, yet they are several and cannot be recovered in a joint judgment.² But all the joint owners or joint tenants must join; the owner of a part has no exclusive right to possess the whole.³ When parties jointly cultivate lands, they may be regarded as joint owners of the crop, and all must join in an action for its recovery or value.⁴ So when mills are worked on shares, the owner and occupant may be considered as tenants in common of the product, and may join in an action.⁵ Where a society contributed money for the relief of the members, which was put in a box and entrusted with one member, he was not permitted to bring trover against another member who took it from him;⁶ but if the box with the funds was, by agreement of all, left with one for safe keeping and to disburse on the order of the society, no reason is perceived why he might not have sustained replevin for it against any one who took it.⁷ So the agent of several owners of a whaling vessel, who has, by usage of the port, authority to sell the cargo and distribute the supplies, may sustain replevin

¹ *White v. Dolliver*, 113 Mass. 400. Compare *Globe Works v. Wright*, 106 Mass. 207.

² *Chambers v. Hunt*, 18 N. J. L. 380.

³ See *ante*, Chap. VI.

⁴ *Putnam v. Wise*, 1 Hill, 235.

⁵ *Rich v. Penfield*, 1 Wend. 379.

⁶ *Holliday v. Camsell*, 1 Durnf. & E. 658.

⁷ *Newton v. Gardner*, 24 Wis. 232; *Corbett v. Lewis*, 53 Pa. St. 322.

against any of the joint owners who may refuse to deliver it to him;¹ but in such case his right must be irrevocable. If one of the joint owners may revoke the authority, the refusal to deliver will be a revocation.² But trover may be brought by one joint tenant by his co-tenant for joint property which the defendant has destroyed.³ When one tenant in common takes all the chattels, the co-tenant hath no action, but may retake them if he can.⁴

§ 636. Trustees, executors and administrators may be plaintiffs. The action may be sustained by trustees when they are entitled to the possession of chattels in that capacity;⁵ or by one entitled to possession for the use of another;⁶ or by an executor or administrator in his capacity as representative of the deceased.⁷ Such a one can also sue in his individual capacity in cases where he is individually liable.⁸ Where brought by an executor or administrator, for a taking or detention from the deceased in his lifetime, the plaintiff must show the right of possession in the deceased, his death, together with the legal qualification of the plaintiff as such executor or administrator.⁹

§ 637. Suit against an executor or administrator. When the suit is against an executor or administrator, it should be against him individually; his taking or subsequent detention is not the act of the estate, but of himself as an individual.¹⁰ An administrator cannot in his official capacity commit a tort.¹¹ When the taking was by the deceased in his lifetime,

¹ Rich v. Rider, 105 Mass. 307.

² See Hunt v. Rousmanier, 8 Wheat. 174; Roberts v. Wyatt, 2 Taunt. 268.

³ Wilson v. Reid, 3 Johns. 174.

⁴ Coke on Lit., tit. Trover.

⁵ Baker v. Washington, et al., 5 Stewart & P. (Ala.) 144.

⁶ Pearce v. Twitchell, 41 Miss. 344.

⁷ Cravath v. Plympton, 13 Mass. 454; Hambly v. Trott, 1 Cowp. 374; Cummings v. Tindall, 4 Stewart & P. (Ala.) 361; Alleu and wife v. White, Admr., 16 Ala. 181.

⁸ Patchen v. Wilson, 4 Hill, 59; Branch v. Branch, 6 Fla. 315; Carlisle v. Burley, 3 Gr. (Me.) 250; Hollis v. Smith, 10 East. 293.

⁹ Halleck v. Mixer, 16 Cal. 574; Branch v. Branch, 6 Fla. 315.

¹⁰ Smith v. Wood, 31 Md. 293.

¹¹ Rose v. Cash, 58 Ind. 278.

and the property is detained by the administrator or executor, such facts may be alleged and proved in an action against the latter.¹

§ 638. **A parish or corporation may bring the action.** In Massachusetts, where the parochial system prevailed, the action was permitted in the name of a parish for the recovery of its records.² It will also lie by or against a corporation;³ but the corporation must sue in its corporate name and capacity. Individual members composing the body cannot assert the right of the corporation.⁴ It has been said that replevin would not lie against a corporative aggregate, the reason being that such body could only distrain by bailiff, and the bailiff would be the proper defendant in a replevin suit of the distress.⁵ This doubtless was in conformity to the old rule; but in modern jurisprudence a different practice has sprung up. It has been held that trespass for assault and battery would not lie against a corporation, for the reason that such a tort could only be committed by some person, while a corporation had no tangible existence;⁶ but this case was subsequently considered in an Illinois case and its authority denied;⁷ and the latter case is doubtless the true exponent of the law on this subject. Any other rule would enable a corporation to employ a worthless bailiff, and deprive the plaintiff of all the benefit of the remedy.⁸

§ 639. **Whether an assignee of property in the possession of another can sue.** The question as to whether the owner of goods which have been wrongfully taken can transfer the property, and with it a cause of action, is one upon which the authorities are at variance. By the common law, the right of

¹ *Brewer v. Strong's Exrs.*, 10 Ala. 965; *Easley v. Boyd*, 12 Ala. 685.

² *Sudbury v. Stearns*, 21 Pick. 148.

³ *Beech v. Fulton Bank*, 7 Cow. (N. Y.) 485; *Maund v. Monmouth Canal*, 1 Carr. & Marsh, 606; *Fayette Ins. Co. v. Rogers*, 30 Barb. 491.

⁴ *Bartlett v. Brickett*, 14 Allen, 62.

⁵ Barb. on Parties, 214.

⁶ *Orr v. Bank of the United States*, 1 Ham. (O.) 37; *Bradley on Distresses*, 91.

⁷ *C. & A. R. R. v. Dalby*, 19 Ill. 353.

⁸ See *C. & N. W. Ry. v. Peacock*, 48 Ill. 253, where trespass was sustained against a corporation.

action was not assignable. The owner of property in the possession of another who claimed to own it was looked upon as having a right of action which he must proceed upon in his own name, or forego his right. He was not permitted to sell and transfer this right to sue to another.¹ The term "*choses in action*" includes all rights to personal property not in possession, which may be enforced in an action at law, and is not limited to damages recoverable for breach of contract.² And *choses in action* were not assignable at the common law, and especially the right to sue for a tort was the personal privilege of the party, and not transferable.

§ 640. **Sale of property permitted, notwithstanding adverse possession of another.** The right to sue in replevin has therefore been denied to an assignee of property in the possession of another. This was placed upon the ground that the assignment was a mere transfer of a right to sue, or a right to litigate, arising out of a tort.³ Statutory changes, however, have been made in many of the States, which do away with the common law rule, and permit an assignment in such cases, and allow the assignee to sue in his own name.⁴ Cases are numerous in modern practice where the assignment has been regarded, not as a transfer of a cause of action, with the right to litigate, but as a sale of the property.⁵ The courts hold, that when the owner of property elects to part with it, and does sell it to one who is competent to acquire title, the wrongful act or trespass of a third party shall not be permitted to defeat a contract otherwise valid and complete.⁶ The reasoning of HALLET, C. J., in *Hanauer v. Bartels*, carries considerable force in support of this doctrine. He says, in substance, that "the taking

¹ 1 Ch. Plea. 15; *O'Keefe v. Kellogg*, 15 Ill. 352; *McGoon v. Ankeny*, 11 Ill. 558; *Clapp v. Shepard*, 2 Met. 127.

² *Gillet v. Fairchild*, 4 Denio, 81.

³ *Nash v. Fredericks*, 12 Abb. Pr. R. 147, cases last cited.

⁴ *Lazard v. Wheeler*, 22 Cal. 140.

⁵ *Cummings v. Stewart*, 42 Cal. 230; *McKee v. Judd*, 2 Kernan, 622; *Hoyt v. Thompson*, 1 Seld. 347; *Hall v. Robinson*, 2 Comst. 295; *North v. Turner*, 9 S. & R. 244; *DeWolf v. Harris*, 4 Mason, 530; *Cass v. N. Y. & N. H. R. R.*, 1 E. D. Smith, 522.

⁶ *Webber v. Davis*, 44 Me. 147; *Morgan v. Bradley*, 3 Hawks, (N. C.) 559.

and detention of property by a wrong doer does not deprive the owner of the power of making a valid sale of it. The purchaser, upon giving the holder notice of the transfer, may demand the property, and upon refusal, may maintain an action for the wrongful detention. * * * When the vendor and vendee of property are of an agreeing mind, where one intends to sell and deliver, and the other to accept, the object sought to be obtained cannot be defeated by the wrongful act of a third person, who has no other title than naked possession."¹

§ 641. **The same. Purchaser may recover.** In addition to the soundness of this reasoning, the rule is supported by many well considered cases.² *Lazard v. Wheeler*, 22 Cal. 140, was a case where this question was presented, but decided on the authority of the code of that State, though the opinion of the court clearly indicates that, aside from the provisions of the code, the action might be brought by an assignee. In *Tome v. Dubois*, 6 Wall. (U. S.) 548, the Supreme Court of the United States says, that owners of personal property are not obliged to treat the acts of third persons, who invade their rights of property or possession, as a conversion. They may elect to waive the tort, and in such case may sell the property, and the purchaser may, after demand, sustain trover or replevin.

§ 642. **The same. Illustrations.** The assignee of a note, and chattel mortgage to secure it, may sustain replevin for the mortgaged property upon condition broken.³ Goods which have been seized by the sheriff on process, may be sold by the owner. This is not regarded as a sale of the cause of action, but of the goods.⁴ When the plaintiff in replevin delivered the chattel to his bondsman as his security, and was afterwards

¹ *Hanauer v. Bartels*, 2 Col. 522.

² *Cass v. N. Y. & N. H. R. R.*, 1 E. D. Smith, 522; *McGinn v. Worden*, 3 E. D. Smith, 355; *Hall v. Robinson*, 2 Comst. 295; *Cartland v. Morrison*, 32 Me. 190; *The Brig Sarah, etc.*, 2 Sumn. (U. S. C. C.) 211; *Hall v. Robinson*, 2 Comst. (2 N. Y.) 293; *Parsons v. Dickinson*, 11 Pick. 354; *Carpenter v. Hale*, 8 Gray, (Mass.) 157; *Webber v. Davis*, 44 Me. 147.

³ *Barbour v. White*, 37 Ill. 165; *Hopkins v. Thompson*, 2 Port. (Ala.) 434.

⁴ *Coghill v. Boring*, 15 Cal. 218.

declared bankrupt, the security was permitted to recover in the bankrupt's name, for his own benefit.¹

§ 643. **A father may sue for property of his minor child.** A father, being the natural guardian of his minor children, when they have no other guardian, may sustain replevin for their personal property,² or the infant may sue by his guardian or next friend; but a father would not be liable for a willful taking by his minor child, unless he in some way countenance or encourage it,³ the minor himself being liable for his torts.⁴ A guardian may maintain the action for property belonging to his ward, of which he is entitled to possession.⁵

§ 644. **Servant cannot sue for his master's goods.** A mere servant who has possession of goods by delivery from his master, which the master may at any time put an end to, has not such property or right of possession as will enable him to sustain this action.⁶ But if one deliver goods to his servant as his bailee, and where the latter is responsible for them, he may be plaintiff in an action of trover.⁷ So an officer who has seized goods upon process has sufficient property in them to sustain the action; he is responsible to the plaintiff in his process.⁸ Where a commission in bankruptcy issues the assignee cannot sue an officer for goods of the bankrupt seized before the appointment of the assignee, though the officer sells afterward.⁹

§ 645. **Receiptor of an officer.** The question as to whether a receiptor to an officer who has seized goods on execution or attachment has such a property as will enable him to sustain replevin, has given rise to contradictory decisions. This right

¹ *Sawtelle v. Rollins*, 23 Me. 196.

² *Smith v. Williamsón*, 1 Har. & J. (Md.) 147; *Newman v. Bennett*, 23 Ill. 427.

³ *Tift v. Tift*, 4 Denio, 175.

⁴ *School Dist., etc., v. Bragdon*, 23 N. H. 507, cited as *Milton v. Bragdon*, 23 N. H. 507.

⁵ *Deacon v. Powers*, 57 Ind. 489; *Newman v. Bennett*, 23 Ill. 427.

⁶ *Harris v. Smith*, 3 S. & R. (Pa.) 23; *Brownell v. Manchester*, 1 Pick. 232; *Clark v. Skinner*, 20 Johns. 465; *Ludden v. Leavitt*, 9 Mass. 104.

⁷ *Harris v. Smith*, 3 Serg. & R. 23.

⁸ *Brownell v. Manchester*, 1 Pick. 232.

⁹ *Smith v. Clark*, 4 Duruf. & E. 476.

has been denied in many cases.¹ In *Miller v. Adsit*, 16 Wend. 335, after an elaborate discussion of the question and the authorities *pro* and *con.*, the court held that a receiptor, where he was accountable to the officer, had such possession as would enable him to sue. It is difficult to see any good reason which should deny the right of action to such a person where by the terms of the deposit he has the rightful possession of the goods, and is responsible to the officer for their safe return. His capacity is rather that of a bailee than a servant; he has an interest in the protection of the goods, and such a right as would justify him in resisting a trespass; he would be liable for the value in case he failed to protect them.

§ 646. **Attaching creditor not liable jointly with the officer.** An attaching creditor is not liable jointly with the sheriff who serves the attachment and takes possession of the property. The officer is the proper defendant.² When the attaching creditor has possession of the goods he may be a defendant; and an attaching creditor cannot be joined as plaintiff with the officer for a taking of goods from the officer's possession unless he had some possession at the time of taking.

§ 647. **Minor cannot sue.** A minor cannot sustain the action in his own name. Two partners who were minors joined in a chattel mortgage; one of them became of age and ratified the mortgage; the other could not sustain replevin after dissolution of the firm, though he had acquired the interest of the other partner. A minor must sue by his guardian or next friend.³ The same rules apply to one laboring under any other legal disability. The surviving partner is entitled to the possession of the goods of the firm, and may recover them from one who wrongfully interferes; it is not necessary that he declare as surviving partner; his right to recover is an individual right, and he is not required to state the facts under which he claims title.⁴ In some States local laws vests

¹ *Ludden v. Leavitt*, 9 Mass. 104; *Warren v. Leland*, 9 Mass. 265; *Commonwealth v. Morse*, 14 Mass. 217; *Dillenback v. Jerome*, 7 Cow. 294; *Norton v. People*, 8 Cow. 137.

² *Richardson v. Reed*, 4 Gray, (Mass.) 443; *Ladd v. North*, 2 Mass. 516.

³ *Keegan v. Cox*, 116 Mass. 290.

⁴ *Smith v. Wood*, 31 Md. 293.

the administrator with the interest of the deceased partner in partnership chattels. In such cases the administrator, and not the surviving partner, may sue.

CHAPTER XX.

PLEADING.

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§ 648. **Pleading.** The pleadings in replevin at common law were complicated and peculiar to this action.¹ They

¹ Robinson v. Calloway, 4 Ark. 100; Southall v. Garner, 2 Leighs, (Va.)

have, however, been greatly simplified by modern legislation, aided by the liberal construction of the courts. The limits of this work will not permit the consideration of any of the local statutes; a statement of the general principles is all that can be attempted.

§ 649. **Established rules govern.** Established rules and precedents should, in all cases, be followed. Any unnecessary departure from the recognized procedure, whether it arise from love of change, or from carelessness or ignorance, should not be encouraged.¹ Statutory provisions where they exist, whether they relate to the forms of pleading or mode of procedure, must be strictly followed.² Each State has its own peculiar laws which govern its practice. These are constantly being changed, and any attempt to state them would be likely to mislead.

§ 650. **The affidavit.** The first step in the proceeding is the affidavit. This, though not a part of the record,³ is one of the most important papers in the case. It is essential in all cases where the plaintiff desires a delivery of the property pending the action. In many of the States the plaintiff may elect to begin and prosecute his suit without asking delivery of the goods prior to judgment. Under such circumstances neither affidavit nor bond is necessary.⁴

§ 651. **A prerequisite to delivery.** In all cases where the

372; *Rogers v. Arnold*, 12 Wend. 34; *Gilb. on Replevin*, 119; 1 Ch. Plea, title *Replevin*; *Woodf. on L. & T.* 588; *Bacon Abr.* title *Replevin* and *Avowry*. Both parties are plaintiff; each may claim judgment. *Seymour v. Billings*, 12 Wend. 286; *Persse v. Watrous*, 30 Conn. 146; *Brown v. Smith*, 1 N. H. 36; *McLarren v. Thompson*, 40 Me. 285; *Poor v. Woodburn*, 25 Vt. 239.

¹ *McPherson v. Melhinch*, 20 Wend. 671; *Anstice v. Holmes*, 3 Denio, 245.

² *Pirani v. Barden*, 5 Ark. 81. When petition complies substantially with the provision of the statute, it is sufficient. The form or words of the statute need not be literally followed. *Smith v. Montgomery*, 5 Iowa, 371; *Auld v. Kimberlin*, 7 Kan. 601; *Busick v. Bumm*, 3 Iowa, 63.

³ *Town v. Wilson*, 8 Ark. (3 Eng.) 465; *Loomis v. Youle*, 1 Minn. 175; *Cox v. Grace*, 5 Eng. (Ark.) 86. *Contra*, see *Newell v. Newell*, 34 Miss. 385.

⁴ *Baker v. Dubois*, 32 Mich. 92; *Catterlin v. Mitchell*, 27 Ind. 298; *Hodson v. Warner*, 60 Ind. 214.

plaintiff asks a delivery of the goods in the first instance, the affidavit is a prerequisite to the issuing of the writ or order for delivery. Without it the writ would be a nullity if issued, and the suit must fail.¹ The affidavit is in no way essential to the trial of the case.² It is not evidence and does not prove or tend to prove the plaintiff's title to the property, though its statements as to value of the property may sometimes be taken to estop the plaintiff who made it from asserting a different value.³ Its truth or falsity is not a question at issue on the trial.⁴

§ 652. **Must not be entitled.** The affidavit must not be entitled in the suit. The reason is that at the time of making it there is no suit pending.⁵

§ 653. **Must be drawn to meet the evidence.** The affidavit should be framed with a view to the evidence which will be produced at the trial. If the action be for a wrongful detention, proof of a wrongful taking would sustain such an averment without proof of demand.⁶ Proof of a wrongful detention, however, will not sustain an averment of a wrongful taking. If the evidence will sustain an averment of wrongful taking, it is advisable, as simplifying the question of damages, that the declaration contain such a count. The aver-

¹ *Wilbur v. Flood*, 16 Mich. 40; *Milliken v. Selye*, 6 Hill, 623; S. C., 3 Denio, 57; *Perkins v. Smith*, 4 Blackf. 302; *Bridge v. Layman*, 31 Ind. 385; *Payne v. Bruton*, 5 Eug. (Ark.) 57; *Cutler v. Rathbone*, 1 Hill, 204; *Kehoe v. Rounds*, 69 Ill. 352; *McClaughry v. Cratzenberg*, 39 Ill. 123; *Stacy v. Farnham*, 2 How. Pr. Rep. 26; *Phenix v. Clark*, 2 Mich. 327. Sheriff or coroner cannot administer the oath. *Berrien v. Westervelt*, 12 Wend. 194.

² *Town v. Wilson*, 8 Ark. (3 Eng.) 464.

³ See *post*, § 658.

⁴ *Payne v. Bruton*, 5 Eng. (Ark.) 57; *Town v. Wilson*, 8 Ark. (3 Eng.) 465.

⁵ *Rex v. Jones*, 1 Str. 704; *Haight v. Turner*, 2 John. 371; *People v. Tioga C. P.*, 1 Wend. 292; *Hollis v. Brandon*, 1 Bos. & Pull. 36; *King v. Cole* 4 Term R. 298 and 640; *Whitney v. Warner*, 2 Cow. 500; *Nichols v. Cowies*, 3 Cow. 345; *Milliken v. Selye*, 3 Denio, 57; *Stacey v. Farnham*, 2 How. Pr. Rep. 26. But see and compare in this respect, *In re Bronson and Mitchell*, 12 Johns. 460, and note. The venue must be stated. Compare *Cook v. Staats*, 18 Barb. 407.

⁶ *Oleson v. Merrill*, 20 Wis. 462; *Stillman v. Squire*, 1 Denio, 327; *Cummings v. Vorce*, 3 Hill, 232; *Pierce v. Van Dyke*, 6 Hill, 613; *Cox v. Grace*, 10 Ark. 87.

ments in both the writ and declaration should follow the complaint or affidavit.¹

§ 654. **Takes place of the complaint.** The affidavit takes the place of the complaint, or rather it is the complaint, the word having the same meaning that it had in the Statute of Marlbridge. That statute required that there should be a "complaint," *i. e.*, complaint. This was simply a statement to the sheriff of the wrongful taking, upon which he made the delivery. There appears to be no authority for saying that it was, at that time, required to be in writing. The affidavit of modern practice is the "complaint" of olden time.²

§ 655. **By whom made. General requisites.** The affidavit may be made by the plaintiff, or some one in his behalf; when made by an agent, its averments must be as positive as those required from the principal.³ It must be in writing, and signed by the plaintiff, or his agent making it.⁴ There are cases, however, which hold that an affidavit purporting to be sworn to by plaintiff, and certified to be sworn to by him, is good without signature.⁵ It must state that the plaintiff is the owner, and entitled to the immediate possession of the goods about to be replevied. The statutory requirements of the different States vary somewhat as to what is necessary to be stated in the affidavit, but they all substantially agree with the common law upon this point.⁶

§ 656. **Meaning of "owner."** The term "owner," as used in this connection, does not import absolute ownership; any

¹ *Newell v. Newell*, 34 Miss. 386. In Illinois it is not necessary to allege a wrongful taking or even a wrongful detention by the defendant. *Whistler v. Roberts*, 19 Ill. 274. But this cannot be stated to be the general rule.

² *Anderson v. Hapler*, 34 Ill. 439.

³ *Frink v. Flanagan*, 1 Gilm. (Ill.) 37. See, also, *Branch v. Branch*, 6 Fla. 315.

⁴ *Eddy v. Beal*, 34 Ind. 161.

⁵ *Jackson v. Virgil*, 3 Johns. 540; *Shelton v. Berry*, 19 Tex. 154; *Crist v. Parks*, 19 Tex. 234; *Haff v. Spicer*, 3 N. Y. Term, (Ca. Ca.) 190. When affidavit was signed by G. W. and R. Hoover, and sworn to by both, *held* sufficient. *Hoover v. Rhoads*, 6 Iowa, 506.

⁶ In Arkansas plaintiff must swear that the cause of action occurred within two years. *Payne v. Bruton*, 5 Eng. (Ark.) 57. See *Milliken v. Selye*, 3 Denio, 56.

special interest in the property will be sufficient.¹ In Ohio this question was directly presented. It was objected that the statute said, "If any person shall wrongfully detain the goods and chattels of another, the '*owner*,' his agent or attorney, may file, etc., etc.," and the court said in substance: It is the possessory title, and not the general ownership, which must be sworn to. Ownership without a right to immediate possession will not enable a man to make the statutory affidavit; but a right to immediate possession, without general ownership, will. If the word owner in the statute meant the owner of the general title, then an owner of a special title, such as a lease, even though entitled to possession, could not sustain the action even against a trespasser. To hold that a person with a limited or special title cannot make the affidavit to sustain this action, would destroy the uniform practice, and frequently result in irreparable mischief. The affidavit must be sworn to before the proper officer; in the absence of statutory provisions the sheriff or coroner cannot administer the oath.²

§ 657. Defects in; when to be taken advantage of and how. Formal defects in the affidavit must be taken advantage of before pleading to the merits; if not, they will be considered as waived.³ Objections to the affidavit must be taken by motion or by plea in abatement; not by demurrer,⁴ the reason being that demurring will not reach matters outside the record, and the affidavit is not a part of the record.⁵ So, where the objections to the affidavit are taken by motion, the

¹ *Johnson v. Carnley*, 6 Seld. (N. Y.) 578; *Sprague v. Clark*, 41 Vt. 6; *Williams v. West*, 2 Ohio St. 83; *Rogers v. Arnold*, 12 Wend. 35.

² *Berrien v. Westervelt*, 12 Wend. 194. If a complaint (declaration) contains all that is necessary in an affidavit, and is sworn to and filed before the writ issues, the want of a separate affidavit on separate paper cannot be objected to. *Minchrod v. Windoes*, 29 Ind. 288. See, also, *Perkins v. Smith*, 4 Blackf. (Ind.) 299.

³ Defects in affidavits are waived if defendants appear and go to trial without objection. *Smith v. Emerson*, 16 Ind. 355. See *Tripp v. Howe*, 45 Vt. 523; *Eddy v. Beal*, 34 Ind. 161; *Lewis v. Brackenridge*, 1 Blackf. 112; *Baker v. Dubois*, 32 Mich. 92; *Perkins v. Smith*, 4 Blackf. (Ind.) 299; *Frink v. Flanagan*, 1 Gilm. 38.

⁴ *De Wolf v. Harris*, 4 Mason C. C. 515.

⁵ *Cox v. Grace*, 5 Eng. (Ark.) 86.

motion ought to set out and crave *oyer* of it; otherwise the court may refuse to examine or pass upon it.¹

§ 658. **The truth of the affidavit not in issue.** The truth or falsity of the affidavit is not a question which can be enquired into upon the trial, except so far as the issues may go. It in no way affects the issues; it is not proof for the party making it.² The want of one may be brought to the knowledge of the court by motion. No reason is perceived why defects in an affidavit may not be taken advantage of by properly pointing them out by a motion in writing. In many of the States this would be sufficient, though a plea in abatement is more technical and exact. When the motion shows the want of an affidavit, the plaintiff may show that it is lost, and ask and obtain leave to supply its place.³ This cannot be done by the clerk, or by simply filing a new affidavit with him; the court must make the order after an examination into the question as to whether it is a copy or not of the instrument offered.

§ 659. **Statement of value of property.** The common practice in most of the States is for the affidavit to state the value of the property.⁴ This is usually accepted as the true value by the sheriff when he comes to take bond. However, this is not obligatory upon him. When no appraisement is required by the statute, he must be the judge as to whether the value stated in the affidavit is sufficient. If he is of opinion it is not, he should require bond in double such sum as he believes to be the true value.⁵ For any failure to take adequate bond, he will be liable.⁶ In many of the States the statute requires an appraisement;⁷ and such value so ascertained is to govern the officer in fixing the amount of the bond.

¹ *Town v. Wilson*, 3 Eng. (Ark.) 464.

² *Payne v. Bruton*, 5 Eng. (Ark.) 57; *Dennis v. Crittenden*, 3 Hand. (42 N. Y.) 544.

³ *Morgan v. Morgan*, 31 Miss. 546.

⁴ *Deardorff v. Ulmer*, 34 Ind. 353; *Schaffer v. Faldwesch*, 16 Mo. 339.

⁵ *Kimball v. True*, 34 Me. 88; *People, etc. v. Core*, 85 Ill. 248; *Roach v. Moulton*, 1 Chand. (Wis.) 187; *Pomeroy v. Trimper*, 8 Allen, 398; *Deardorff v. Ulmer*, 34 Ind. 353; *Murdock v. Will*, 1 Dall. 341.

⁶ *People, etc. v. Core*, 85 Ill. 248.

⁷ *Watkins v. Page*, 2 Wis. 92; *Caldwell v. West*, 1 Zab. (N. J.) 411.

§ 660. **Statement of value in affidavit; how far binding.** The statements in the affidavit as to value usually bind the plaintiff in any subsequent suit between the same parties, on the bond, or in the assessment of damages. The sworn statement of value made at a time when he is seeking to recover the property will estop him from asserting a different one at another time. The defendant is, of course, in no way bound by it.¹

§ 661. **Must state that the property was not taken for any tax, assessment or fine.** Another provision, common to the statutes of all the States is, the affidavit must state that the property was not taken for any tax, assessment or fine levied by virtue of any law of the State. This requirement is imperative.² When the affidavit states that the property had not been seized for any legal tax, it was held to imply that it was taken for a tax of some sort, and the court should dismiss the suit, on motion.³ When it stated that the property was not taken *in execution* for any tax, assessment or fine, the court said this may be true, and still the property may have been distrained, and the affidavit was held insufficient.⁴

§ 662. **Or upon execution or attachment, etc.** The affidavit must also state that the property has not been seized by virtue of any execution or attachment against the goods and chattels of the plaintiff liable to execution or attachment.⁵ So, where the plaintiff was a supervisor of his township, authorized by law to keep and preserve the books and papers belonging to his office, the fact that the property was not legally subject to seizure on an execution or for a tax did not absolve the supervisor from the necessity of stating in his affidavit that it was not so taken. The requirements of the statute are imperative, and the nature of the property makes no difference.⁶ There are cases, however, where the rule does not apply. In Vermont and Connecticut the writ was formerly employed chiefly

¹ See § 453, and the cases there cited.

² *Phenix v. Clark*, 2 Mich. 327; *Mt. Carbon, etc. v. Andrews*, 53 Ill. 182.

³ *McClaghry v. Cratzenberg*, 39 Ill. 123.

⁴ *Campbell v. Head*, 13 Ill. 126.

⁵ *Bridges v. Layman*, 31 Ind. 385.

⁶ *Phenix v. Clark*, 2 Mich. 327.

to recover goods seized on attachment. The proceedings in such cases, however, were governed by local statutes.

§ 663. Or upon any writ of replevin against the plaintiff. In some States the statutes require the affidavit to state that the property for which the suit is brought has not been taken upon any writ of replevin or order for delivery in such action; and it may be said, generally, that the law will not permit cross-replevin. But it has been said this will not prevent the plaintiff from having this action upon a title which accrued to him after the seizure, nor in cases when the execution was void.¹

§ 664. Strict compliance with this condition required. An affidavit, therefore, which stated that the property was not taken on any execution or judgment against the plaintiff, or any other mesne or final process whatsoever, will not be sufficient.² A strict compliance with all these statutory requisites is essential; the object of the law being to prevent the employment of this action in the excepted cases.³ The law furnishes other means to control wrongful seizure in these cases, but will not permit the withdrawal of the property pending the inquiry as to the seizure.

§ 665. It must contain a correct description of the property. Amendments. The affidavit should contain a correct description of the property which the plaintiff seeks to recover, as it will be shown by the proof.⁴ And although amendments are sometimes permitted to correct mistake, and in the furtherance of justice,⁵ caution in the first instance is the safe course.⁶ The affidavit, as has been shown, is the foundation

¹ Williams v. West, 2 Ohio St. 89. *Contra*, see Wilson v. Macklin, 7 Neb. 51.

² Auld v. Kimberlin, 7 Kan. 601.

³ Westenberger v. Wheaton, 8 Kan. 169.

⁴ Taylor v. Riddle, 35 Ill. 567.

⁵ Perkins v. Smith, 4 Blackf. 302; Campbell v. Head, 13 Ill. 126; Parks v. Barkham, 1 Mich. 95; Applewhite v. Allen, 8 Humph. (Tenn.) 698; Baker v. Dubois, 32 Mich. 93; Wilson v. Macklin, 7 Neb. 52.

⁶ Affidavit was signed by plaintiff, but had no jurat attached. He filed affidavit that he did swear to it. *Held*, the court might have permitted it to be verified *nunc pro tunc*. Bergesh v. Keevil, 19 Mo. 128; Anon, 4 How. (N. Y. Pr.) 290. The application to amend should be made before the de-

of the suit. It is a statement to the officer upon which the mandate for delivery issues. The description in the writ and in the subsequent proceedings are based upon and follow the description in the affidavit. It should therefore be exact in all respects.

§ 666. **The declaration. Several counts joined.** It has been the constant practice to employ as many counts in the declaration as the pleader deems necessary for the proper presentment of his case. Counts for wrongful taking are properly joined with counts for the detention. Counts claiming absolute property in plaintiff may be joined with counts in which he asserts a limited interest only.¹ But the averments of the declaration with respect to ownership or interest of the plaintiff in the property should not go beyond the claim in the affidavit and writ.²

§ 667. **Rights of parties under a single count.** Where the declaration contains but a single count for several articles, the plaintiff may recover part and the defendant part, the same as though there had been separate counts; each is entitled to judgment for the goods which he recovered, and to costs so far as he is successful.³ Under a count charging wrongful detention the plaintiff may prove a wrongful taking, but if the charge be for taking it is not supported by proof of a detention merely.

§ 668. **Count in trover for goods not delivered.** In some of the States, in addition to the counts in replevin, the declaration may also contain a count in trover for such goods as the officer has been unable to find and deliver upon the writ.⁴ The count in trover, however, cannot include any other goods than

cision upon the motion to quash the writ. If it is quashed, the suit is no longer pending for any purpose, except to assess damages. *Campbell v. Head*, 13 Ill. 126; *Perkins v. Smith*, 4 Blackf. 302; *Smith v. Emerson*, 16 Ind. 355; *Eddy v. Beal*, 34 Ind. 161.

¹ *Dickinson v. Noland*, 2 Eng. (Ark.) 25; *Cox v. Grace*, 10 Ark. 87.

² *Barnes v. Tannchill*, 7 Blackf. 605; *Cox v. Grace*, 10 Ark. 87; *Nichols v. Nichols*, 10 Wend. 630.

³ *Seymour v. Billings*, 12 Wend. 236.

⁴ *Nashville Ins. Co. v. Alexander*, 10 Humph. (Tenn.) 333; *Karr v. Barstow*, 24 Ill. 580.

those described in the writ, and which are shown by the officer's return not to have been delivered.¹

§ 669. **Value of such goods usually given in damages.** The general practice prevailing in most of the States permits the plaintiff to recover the value of such articles as are not delivered as damages. The count in trover is purely statutory and can be allowed only when the statute so provides.

§ 670. **Form of the declaration; wrongful detention.** The declaration should be drawn to meet the proof which will be produced at the hearing.² The gist of the action is the wrongful detention. The plaintiff must allege the right or title in himself as it exists, the right to immediate possession, and the detention by the defendant.³ This allegation of wrongful detention is essential, and the proof to sustain it is equally essential.⁴ If the goods were restored before suit brought, the plaintiff cannot succeed on this action. An allegation that the defendant was about to take possession⁵ will not sustain replevin.⁶ If the declaration allege that the defendant "detained," it would imply that he had detained them but that were delivered to the plaintiff on the writ. Under this charge he could not recover damages subsequent to return of the writ. If the allegation be "he detains," this implies that the goods are still detained, and the plaintiff may prove and recover damages down to the time of the trial, and may also have as judgment for the value, in case the goods are not delivered, which he could not have under a charge of "he detained."⁷ When the facts warrant such a charge it is best to allege a "wrongful taking,"⁸ as well as detention, as simplifying the question of damages. A declaration for taking (in the

¹ *Dart v. Horn*, 20 Ill. 212.

² *Newell v. Newell*, 34 Miss. 385.

³ *Wilson v. Fuller*, 9 Kan. 177; *Paul v. Luttrell*, 1 Col. 317; *Yandle v. Crane*, 13 Kan. 347.

⁴ *Brown v. Holmes*, 13 Kan. 482.

⁵ *Paul v. Luttrell*, 1 Col. 317.

⁶ *Herron v. Hughes*, 25 Cal. 555.

⁷ *Petre v. Duke*, Lutw. 360; *Potter v. North*, 1 Wm. Saurd. 347 b n. 2; *Fox v. Prickett*, 5 Vroom, (N. J.) 13.

⁸ *Reynolds v. Lounsbury*, 6 Hill, 534.

"*cepit*,") should allege a "wrongful" taking, but an omission in this respect is cured by verdict.¹ Proof of a wrongful taking is not admissible under an allegation of wrongful detention unless it be for the purpose of excusing the plaintiff from the necessity of proving a demand and refusal.² Where the action is against two or more for a joint wrongful taking it may, perhaps, be necessary to show a combination, or joint act, in order to secure a recovery against both, but it need not be alleged in the declaration.³

§ 671. **Allegation of wrongful taking; special damages must be specially alleged.** If there was wrongful taking, attended with any acts of willful wrong or insult, the declaration should so charge; the plaintiff may have the opportunity of enhancing his claim for damages by means of such proof.⁴ If there are any special causes of damages the plaintiff should aver them in his declaration. There is room for misunderstanding on this subject, and considerable care should be used to avoid error. Damages which are the natural and expected result of the defendant's act, that is, all such damages as the law presumes to have accrued from the wrongful act, need not be specially alleged.⁵ But the real or actual damages sometimes would not fall under this presumption, and in such cases they must be specially stated, to prevent surprise.⁶ Where the action was for destroying a barn the plaintiff could not show the cost of boarding his horses elsewhere unless under some special allegation.⁷ When the action was trover for a note which the defendant wrongfully claimed to hold as a valid note of the plaintiff, under a special allegation the plaintiff could recover such damages as the wrongful act

¹ *Reynolds v. Lounsbury*, 6 Hill, 534. See *Childs v. Hart*, 7 Barb. 370, where it was held that an allegation that the defendant took and unjustly detained would imply a wrongful taking.

² *Eldred v. The Occonto Co.*, 33 Wis. 141; *Newell v. Newell*, 34 Miss. 385; *Coit v. Waples*, 1 Minn. 134.

³ *Herron v. Hughes*, 25 Cal. 560.

⁴ *Newell v. Newell*, 34 Miss. 385.

⁵ Ch. Pl. 428.

⁶ *De Forest v. Lute*, 16 Johns. 122; *Nunan v. City and Co. of San Francisco*, 38 Cal. 689; *Burrage v. Melson*, 48 Miss. 239.

⁷ *Shaw v. Hoffman*, 21 Mich. 155.

occasioned.¹ *Vicksburg & Merden R. R. Co. v. Ragsdale*, is a case where this question is ably and extensively discussed.² Damages beyond the value of the property may be given when the taking was accompanied by acts of outrage, if such damages were the natural result of the taking; but consequential damages, not the natural result of the taking, must be specially claimed in the declaration.³

§ 672. The same. Special requirements. It must allege that the goods are the goods and chattels of the plaintiff; it is not sufficient to say that the goods were taken out of the plaintiff's possession,⁴ or to charge that defendant agreed to transfer the property to plaintiff,⁵ or to simply allege that the plaintiff was entitled to possession.⁶ The declaration must expressly allege that the goods are the property of the plaintiff.⁷ That this is material will appear when it is considered that the defendant's plea is only to put in issue the property in the plaintiff.⁸ In Iowa, it appears that the right to possession may alone be put in issue and determined,⁹ and the averment of ownership does not require proof of absolute title to support it, but a right of present dominion or control over it, is sufficient.¹⁰ Ownership without a right to immediate possession will not enable the party to make the affidavit, but right of present exclusive possession will, irrespective of the general title.¹¹ The evidence of title must not be set up, but the fact must be stated; the declaration should state positive

¹ *Park v. McDaniels*, 37 Vt. 595.

² *V. & M. R. R. Co. v. Ragsdale*, 46 Miss. 459.

³ *Schofield v. Ferrers*, 46 Pa. St. 438.

⁴ *Bond v. Mitchell*, 3 Barb. 304; *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217; *Johnson v. Neale*, 6 Allen, (Mass.) 227; *Prosser v. Woodward*, 21 Wend. 205; *Robinson v. Calloway*, 4 Ark. 101.

⁵ *Bailey v. Troxell*, 43 Ind. 433.

⁶ *Pattison v. Adams*, 7 Hill, (N. Y.) 126; *Webb v. Fox*, 7 Durnf. & East. 392.

⁷ *Fontleroy v. Aylmer*, 1 Ld. Raym. 239.

⁸ *Bond v. Mitchell*, 3 Barb. 304.

⁹ *Cassel v. Western Stage Co.*, 12 Iowa, 47.

¹⁰ *Johnson v. Carnley*, 6 Seld. (N. Y.) 570; *Sprague v. Clark*, 41 Vt. 6; *Cleaves v. Herbert*, 61 Ill. 127.

¹¹ *Williams v. West*, 2 Ohio St. 83.

issuable facts, not a rehearsal of argument.¹ An allegation of fraud in a horse trade is not sufficient, without showing a rescission of the contract; such a contract may be voidable, but until avoided is valid.² An allegation that the plaintiff on a certain day owned and possessed certain property, and that the defendant on that day took and wrongfully detained it, is sufficient.³ It must show a right to the property in dispute in the plaintiff at the time suit was begun.⁴

§ 673. **The same. Allegation as to time and place.** It should state that the defendant, upon a time stated, which must be prior to the issuing of the writ,⁵ at a place which must be indicated, such as within a certain village or town,⁶ wrongfully took, and unjustly detains;⁷ or, if the action be for detention only, the count may state that the defendant took, and "unjustly detains"⁸ the plaintiff's goods.⁹

§ 674. **The same.** Formerly the plaintiff was required to state the close.¹⁰ This was because distress could only be

¹ *Fidler v. Delavan*, 20 Wend. 57.

² *McCoy v. Reck*, 50 Ind. 283.

³ *Adams v. Corrison*, 7 Minn. 456; *Hurd v. Simonton*, 10 Minn. 423.

⁴ *Loomis v. Youle*, 1 Minn. 175.

⁵ It is a good defense that the writ issued before the cause of action accrued. *Wingate v. Smith*, 20 Me. 287. The date of the writ is not conclusive as to the time when the suit was begun. *Federhen v. Smith*, 3 Allen, 119.

⁶ *Johnson v. Woolyer*, 1 Stra. 507; *Muck v. Folkroad*, 1 Browne, (Pa.) 60; *Gardner v. Humphrey*, 10 Johns. 53; *Williams v. Welch*, 5 Wend. 290. The action is local to the place of taking. *Sleeper v. Osgood*, 50 N. H. 335. And it has been said a change of venue is not usually granted. *Atkinson v. Holcomb*, 4 Cow. 45.

⁷ *Reynolds v. Lounsbury*, 6 Hill, 534. Compare *Childs v. Hart*, 7 Barb. 370.

⁸ *Childs v. Hart*, 7 Barb. (N. Y.) 370; *Hurd v. Simonton*, 10 Minn. 423; *Adams v. Corrison*, 7 Minn. 456; *Coit v. Waples*, 1 Minn. 134; *Nichols v. Nichols*, 10 Wend. 630.

⁹ *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217; *Pattison v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barb. 304; *Robinson v. Calloway*, 4 Ark. 101. Goods which the plaintiff was entitled to the possession of, substantially sufficient. *Prosser v. Woodward*, 21 Wend. 205; *Stickney v. Smith*, 5 Minn. 486. It is sufficient to allege that the defendant took the goods of the plaintiff and unjustly detains the same. *Childs v. Hart*, 7 Barb. 370; *Simmons v. Lyons*, 3 Jones & Spencer, (N. Y.) 554; *Bond v. Mitchell*, 3 Barb. 304.

¹⁰ *Gardner v. Humphrey*, 10 Johns. 53.

made upon the land out of which the writ issued.¹ This rule has been so changed that in cases other than for a distress for rent, a statement of the town will suffice.² So, when the declaration stated that the property was taken from the dwelling of the plaintiff, on Gay street, proof that the taking was on Gay street, sufficed.³

§ 675. **Averment of wrongful detention essential.** Whatever may be the facts in the case concerning the wrongful taking, and whatever be the allegations in the declaration upon that question, it is imperative that the declaration contain an averment of a wrongful detention by the defendant at the time the suit was begun; without this the plaintiff does not state a cause of action.⁴ This question was squarely presented in Colorado, where the plaintiff declared for the taking, and the defendant pleaded *non detinet*, and the court held the issue material.⁵ A very similar rule was followed in Kansas.⁶ As an omission to charge a wrongful detention, which is the gist of the action, is therefore fatal.⁷

§ 676. **Evidence of title not necessary to be stated.** The plaintiff is not at liberty to state the evidence of his title, but must simply aver title by direct and traversable averment.⁸ In support of this averment, proof that the plaintiff was in actual undisputed possession, claiming to own the goods, is sufficient

¹ Steph. *Nisi Prius*, vol. 2, p. 1333.

² Muck v. Folkroad, 1 Browne, (Pa.) 60; Ely v. Ehle, 3 Comst. (N. Y.) 510; Williams v. Welch, 5 Wend. 290.

³ Faget v. Brayton, 2 Har. & J. (Md.) 350.

⁴ Childs v. Hart, 7 Barb. 370; Hurd v. Simonton, 10 Minn. 423; Adams v. Corriston, 7 Minn. 456; Coit v. Waples, 1 Minn. 134.

⁵ Paul v. Luttrell, 1 Col. 318.

⁶ Wilson v. Fuller, 9 Kan. 177.

⁷ Draper v. Ellis, 12 Iowa, 316; Brown v. Holmes, 13 Kan. 482; Leroy v. McConnell, 8 Kan. 273.

⁸ Bond v. Michell, 3 Barb. 304; Prosser v. Woodward, 21 Wend. 205; Robinson v. Calloway, 4 Ark. 101; Alwood v. Ruckman, 21 Ill. 200; Pattison v. Adams, 7 Hill. (N. Y.) 126; Vandenberg v. Van Valkenburgh, 8 Barb. 217; Martin v. Watson, 8 Wis. 315; Johnson v. Neale, 6 Allen, (Mass.) 227; Vogle v. Badcock, 1 Abb. Pr. (N. Y.) 176. See Ice v. Lockridge, 21 Tex. 461. It would seem that in Iowa, where a party claims under chattel mortgage, that the declaration should contain a copy of the mortgage and notes. Smith v. McLean, 24 Iowa, 322.

to entitle him to judgment, unless a better title be shown.¹ When the party claims and undertakes to show title, and shows possession only as an incident to title, evidence upon the question of title must control.²

§ 677. **The same. An averment of right of possession sufficient.** The allegation of ownership, as has been shown, does not require for its support proof of ownership of absolute title.³ Where the complainant alleged that the plaintiffs were possessed of the goods, described "as of their own proper goods," it was said to be sufficient.⁴

§ 678. **The same. Observations.** Title by possession, without other right to the property, will, where the possession is rightful, be sufficient to sustain replevin as against a wrong-doer; such title being regarded as sufficient to hold the property against all persons not showing a better title, and to recover it from one who wrongfully seizes it.⁵ The possession

¹ *Ely v. Ehle*, 3 Comst. 507. When the plaintiff has the right to the possession, and can sustain trespass, replevin will lie. See, also, *Dunham v. Wyckoff*, 3 Wend. 280; *Stickney v. Smith*, 5 Minn. 486; *Marshall v. Davis*, 1 Wend. 109; *Hunter v. Hudson Riv. Iron Co.*, 20 Barb. 493; *Brockway v. Burnap*, 12 Barb. 347; *Brockway v. Burnap*, 16 Barb. 309; *Hendricks v. Decker*, 35 Barb. 298. One who has the general or special property in the goods, accompanied by actual or constructive possession, can maintain replevin. *Wilson v. Royston*, 2 Ark. 315. Party without title, except to right of possession, may replevy against a wrong-doer. *Prater v. Frazier*, 11 Ark. 249.

² *Hatch v. Fowler*, 28 Mich. 210.

³ See *ante*, § 96.

⁴ *Stickney v. Smith*, 5 Minn. 486. See *Prosser v. Woodward*, 21 Wend. 206; *Marshall v. Davis*, 1 Wend. 109; *Hunter v. Hudson Riv. etc.*, 20 Barb. 493. When the plaintiff has the right to possession, and can sustain trespass, replevin is a concurrent remedy. *Dunham v. Wyckhoff*, 3 Wend. 280; *Brockway v. Burnap*, 12 Barb. 347; *Brockway v. Burnap*, 16 Barb. 309; *Hendricks v. Decker*, 35 Barb. 298; *Rucker v. Donovan*, 13 Kan. 251. One who has a general or special property in the goods, accompanied by possession, actual or constructive, can maintain the action. *Wilson v. Royston*, 2 Ark. 315. Party without title, if entitled to the possession, may sustain the action against a wrong-doer. *Prater v. Frazier*, 11 Ark. 249.

⁵ *Moorman v. Quick*, 20 Ind. 68; *Miller v. Jones*, Admr., 26 Ala. 260; *Shomo v. Caldwell*, 21 Ala. 448; *Prater v. Frazier*, 6 Eng. (Ark.) 249. Proof of title recently before the taking would raise a presumption of continued ownership, and unless contradicted, would be sufficient. *Smith v. Graves*, 25 Ark. 461. See, also, *Tison's Admr. v. Bowden*, 8 Fla. 69. A mere

must be a lawful one, acquired without force or fraud. The taker up of an estray, without any proceeding under the law, is a trespasser. His possession is not sufficient. But if one take up an estray, and duly comply with the law in such cases, his possession is rightful.¹

§ 679. **Where the complaint follows the statute.** Where the complaint follows the form laid down in the code for the recovery of chattels in specie, it must be understood as asserting such a title and claiming such an interest in the goods as may be recovered in that form of action.² So where the statute provides that the plea of *non cepit* shall put in issue the property in the plaintiff, as well as the taking, the plaintiff may have a return of the goods under that plea. The charges in the declaration must follow the writ. Thus when the writ charges an unlawful detention, and the declaration an unlawful taking, there will a variance.³ The description of the property should be the same in the affidavit, writ and declaration; each must describe the property as it will appear in the proof.⁴ When the complaint described only part of the property in the affidavit, and it appeared that the other part had been taken from the defendant on an attachment⁵ before the

receiptor, who has received the goods from an officer for safekeeping, cannot sustain replevin. *Warren v. Leland*, 9 Mass. 265; *Ludden v. Leavitt*, 9 Mass. 104; *Dillenback v. Jerome*, 7 Cow. 294; *Norton v. The People*, 8 Cow. 137. But, see, *Miller v. Adsit*, 16 Wend. 335; *Thayer v. Hutchinson*, 13 Vt. 504; *Mitchell v. Hinman*, 8 Wend. 668. So of a servant, who has only a right to possession by virtue of a delivery from his master, which the latter may put an end to at any time; but a bailee may sustain the action. *Harris v. Smith*, 3 S. & R. 23; *Brownell v. Manchester*, 1 Pick. 232; *Stanley v. Gaylord*, 1 Cush. 536; *Bond v. Paddelford*, 13 Mass. 395; *Weld v. Hadley*, 1 N. H. 298.

¹ *Bayless v. Lefaiivre*, 37 Mo. 122.

² *Pickens v. Oliver*, 29 Ala. 528. See *Halleck v. Mixer*, 16 Cal. 574; *Smith v. Montgomery*, 5 Iowa, 370.

³ *Barnes v. Tannehill*, 7 Blackf. 604; *Nichols v. Nichols*, 10 Wend. 630.

⁴ *Snedeker v. Quick*, 6 Halst. (N. J.) 179; *Cronly v. Brown*, 12 Wend. 271; *Stevens v. Osman*, 1 Mich. 92; *Stevison v. Earnest*, 80 Ill. 517.

⁵ *Kerrigan v. Ray*, 10 How. Pr. Rep. 213. When the declaration was for two bay horses, and the proof showed that one was a sorrel, the variance was fatal. *Taylor v. Riddle*, 35 Ill. 567. See *Root v. Woodruff*, 6 Hill, (N. Y.) 418.

writ could be served, it was allowed to stand. Parties may litigate, however, concerning property not included in the writ when they agree to do so. Thus, where property not embraced in the writ was described in the pleading, and the parties stipulated that the right thereto should be determined in the suit, it was regarded as sufficient to give the court jurisdiction.¹

§ 680. **Declaration should state value of goods.** The declaration should state the value of the goods, though the statement of the value of the whole, and not of each article, has been held sufficient.² The statement of value is but a form of pleading. Even where it is not denied in the pleadings, it is not admitted, nor is the defendant precluded from showing the true value to be in excess of the sum stated by the plaintiff.³

§ 681. **Averment of demand.** The declaration at common law need not aver a demand. In Wisconsin, it need not aver demand and refusal. Under a charge of wrongful detention, plaintiff may prove a demand and refusal, or such a taking as will obviate the necessity of a demand.⁴ Local laws will control this question, and no general rule can be stated.

§ 682. **Must claim damages.** The declaration must claim damages. An omission in this respect is a defect which has been held fatal.⁵ The general claim of damages at the conclusion of the declaration will be sufficient to entitle the party to all such damages as are the natural and immediate consequence of the defendant's acts, of which the declaration complains. Thus the plaintiff may prove any depreciation of the goods arising from any natural and expected causes, while

¹ *Sanger v. Kinkade*, 16 Ill. 44.

² *Root v. Woodruff*, 6 Hill, (N. Y.) 418; *Gillies v. Wofford*, 26 Tex. 76; *Ward v. Masterson*, 10 Kan. 78; *Woodruff v. Cook*, 25 Barb. 505.

³ *Chicago & S. W. Ry. Co. v. N. W. Packet Co.*, 38 Iowa, 377; *Bailey v. Ellis*, 21 Ark. 489. But, see *Tulley v. Harloe*, 35 Cal. 306. The objection that the complaint does not allege the value is cured after verdict for damages for the detention. *Bales v. Scott*, 26 Ind. 202. See *Hawkins v. Johnson*, 3 Blackf. 46.

⁴ *Oleson v. Merrill*, 20 Wis. 462. But in some States such averments are necessary. See *Campbell v. Jones*, 38 Cal. 507; *Hurd v. Simonton*, 10 Minn. 423.

⁵ *Faget v. Brayton*, 2 H. & J. (Md.) 350.

they were in the defendant's hands.¹ Special damages must be specially claimed.² In an action to recover possession of a mare, the damage resulting from a loss of flesh, and detention during the breeding season, should be specially alleged.³

¹ *Young v. Willet*, 8 Bosw. (N. Y.) 486.

² *Damron v. Roach*, 4 Humph. (Tenn.) 134.

³ *Stevenson v. Smith*, 28 Cal. 102.

CHAPTER XXI.

PLEADING BY DEFENDANT.

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§ 683. **General rules; each defendant may plead separately.** The action of replevin is in the nature of a tort. The defendant, or if there be more than one, each may set up as many separate defenses as he judges necessary for his protection. It was said by the Supreme Court of Kentucky in 1838, that the defendant in replevin had no legal right to file more than one plea. Formerly special pleas were pleaded under leave of the court, but the leave was always granted as a matter of course; and now the defendant may, as a matter of right under the general rules of practice, plead as many separate proper defenses as are necessary.¹ Proof of one sufficient defense, without reference to the others, will constitute a bar to the action.² Where the action is against two, each may

¹ *Gaines v. Tibbs*, 6 Dana, 147.

² *Rogers v. Arnold*, 12 Wend. 34; *Mt. Carbon, etc. v. Andrews*, 53 Ill. 184; *Amos v. Sinnott*, 4 Scam. 441; *Chambers v. Hunt*, 18 N. J. 339. See and compare *Gaines v. Tibbs*, 6 Dana, (Ky.) 146; *Holton v. Lewis*, 1 McCord, (S. C.) 12; *Knowles v. Lord*, 4 Whart. (Pa.) 500.

claim title to the property in himself,¹ or each and both may plead any proper matter without reference to the statement in the pleading of the other.² It should be observed that where there are two defendants, they must plead the same facts in justification, or they cannot have return. For example, if two defendants set up separate pleas justifying the taking and demanding a return, and they should both be true, the court could not adjudge a return, though each might plead *non cepit* to part of the justifying the taking as to other different, separate parts, and have judgment for a return of that part. But if a joint return is wanted, the defendants must plead or avow the same facts in justification;³ but upon a joint plea of property in one of two defendants, the return may be adjudged to both.⁴

§ 684. **Separate defenses.** It is not material that separate pleas should be consistent with each other; each one is regarded as a separate defense, in no way dependent upon any other, but each must be consistent with itself. Thus *non cepit*, which denies the taking, may be pleaded with an avowry which acknowledges and justifies the taking; or *non cepit* and plea of property in defendant, or in a stranger; or pleas of joint property in the plaintiff and the defendant may, any of them, be joined with any or all of the others without objection, and the party pleading may prove any one of these defenses without the others.⁵

§ 685. **Plea of title; must show title when the suit began.** Pleas which set up title in the defendant, or which rely upon title in any other person than the plaintiff, must allege it as existing at the time suit was begun. A plea claiming title on a certain day before the commencement of the suit is bad.⁶

¹ *Boyd v. McAdams*, 16 Ill. 146.

² *Martin v. Ray*, 1 Blackf. 291.

³ *Gaines v. Tibbs*, 6 Dana, (Ky.) 144.

⁴ *White v. Lloyd*, 3 Blackf. 390. Compare *Gotloff v. Henry*, 14 Ill. 384.

⁵ *Shuter v. Page*, 11 Johns. 196; *Simpson v. McFarland*, 18 Pick. 432; *Whitwell v. Wells*, 24 Pick. 27; *Parsley v. Huston*, 3 Blackf. 348; *Harwood v. Smethurst*, 5 Dutch, (29 N. J.) 195; *Edelen v. Thompson*, 2 Har. & G. (Md.) 32.

⁶ *Patton v. Hamner*, 28 Ala. 618.

The plea must also contain a direct and issuable statement of the facts on which the defendant relies. It must not state the evidence by which facts are proved. If the defendant relies on title, he must state that he is and was owner, not that he bought it.¹

§ 686. **Plea to title, or right of possession.** Where the defendant desires to put the title in issue he must do so by plea of property in himself or in a stranger, accompanied by a traverse of the plaintiff's rights and a denial of the taking.² Under such pleas the defendant may prove title in himself, no matter how derived,³ or anything that shows that at the time the suit was begun he had the right to possession as against the plaintiff.⁴ Plea of property in defendant must be understood to be a claim to all the property, or entire property in the goods, and under such a plea proof of property in the defendant and another is not admissible.⁵ When the plea averred that at the time of the supposed taking the defendant was, and now is, the lawful owner, denying the plaintiff's title, it was regarded in substance as an admission of the taking and detention, with an avowry of title in defendant.⁶ But a plea of *non cepit*, as we shall see, admits the property to be in the plaintiff,⁷ and denies the taking only.

§ 687. **Plea by an officer.** When an officer defends the seizure of goods by virtue of process it need not be set out, but must be pleaded with sufficient certainty to show that it authorized the seizure.⁸ Where the officer justifies the seizure of goods upon *fi. fa.*, he must produce a valid judgment as well as execution. The execution may be a defense to the officer when sued for trespass, but if he claim property in the

¹ McTaggart v. Rose, 14 Ind. 230; Martin v. Watson, 8 Wis. 315; Robinson v. Calloway, 4 Ark. 101.

² Mackinley v. M'Gregor, 3 Whart. 368; Rowland v. Mann, 6 Ired. (N. C.) 38.

³ O'Connor v. Union Line, 31 Ill. 236.

⁴ Dixon v. Thatcher, 14 Ark. 141; Van Namee v. Bradley, 69 Ill. 300.

⁵ McIlvaine v. Holland, 5 Har. (Del.) 10.

⁶ Chase v. Allen, 5 Allen, 599.

⁷ Van Namee v. Bradley, 69 Ill. 300.

⁸ Mt. Carbon, etc. v. Andrews, 53 Ill. 184.

goods as against a stranger he must produce a valid judgment in support of his execution.¹ But the prior possession of the officer under his writ may be sufficient to sustain trover or trespass against a stranger who takes the goods,² and upon the authority of this case a plea setting up his prior possession would be sufficient to entitle the sheriff to a return of the goods taken on execution without showing the judgment.³ If the process be mesne, as, for example, an attachment, a plea setting up the writ will be sufficient without showing the grounds upon which it issued.⁴ But it ought to aver a debt due from the defendant to the plaintiff.

§ 688. **Plea of property in defendant.** The defendant may always set up ownership of the property as a defense. The usual form of this plea is to deny the plaintiff's right to the property, and assert ownership and a right to possession in himself. If the defendant is successful upon this issue the judgment must be for a return of the goods, when they have been delivered to the plaintiff upon the writ, and for damages and costs.⁵ The action, however, is a possessory one, and either party may claim and show a right to the possession at the time the suit was begun. Upon such showing he may recover even as against the owner.⁶ An averment and proof of title, no matter how derived, will not constitute a defense where the plaintiff claims and shown himself entitled to possession.⁷ Where there are two defendants and one of them owns, or has a right to possession of the property, they may so plead; and a judgment for a return will be sustained whether the other has any right or not.⁸

¹ *High v. Wilson*, 2 Johns. 45. See and compare *Holmes v. Nuncaster*, 12 Johns. 395.

² *Barker v. Miller*, 6 Johns. 199.

³ *Thayer v. Hutchinson*, 13 Vt. 503.

⁴ *McGraw v. Welch*, 2 Col. 288. See *Mann v. Perkins*, 4 Blackf. 271.

⁵ *Rogers v. Arnold*, 12 Wend. 34; *Quincy v. Hall*, 1 Pick. 359.

⁶ *Darter v. Brown*, 48 Ind. 395; *Heeron v. Beckwith*, 1 Wis. 20; *Hunt v. Chambers*, 1 Zab. (21 N. J.) 624; *Seldner v. Smith*, 40 Md. 603; *Smith v. Williamson*, 1 Har. & J. (Md.) 147.

⁷ *Corbitt v. Heisey*, 15 Iowa, 296.

⁸ *White v. Lloyd*, 3 Blackf. 390; *Gotloff v. Henry*, 14 Ill. 385; *Waldman v. Broder*, 10 Cal. 379.

§ 689. **Property in third person.** Plea of property in a third person, a stranger to the suit, with a traverse of plaintiff's right, is always good.¹ This plea is permitted on the obvious principle that the plaintiff must show title or right of possession in himself. The burden of proof is on him, and the object of the plea is to show title out of the plaintiff. *Non cepit*, as we shall see, admits the title to be in the plaintiff; it simply denies the taking, and to enable the defendant to contest the plaintiff's title, and ask a return of the goods, he must plead property in himself or some other person, and deny the plaintiff's right as well to property as to possession. The traverse or denial of the plaintiff's right is the material part of the plea; the allegation of title in another is merely inducement.²

§ 690. **Form of the plea; does not admit the taking.** This plea must aver the goods to be the property of some third person, who must be named;³ or, perhaps it may be in a fictitious person,⁴ and should contain traverse or denial of the plaintiff's right, which is the material part of the plea. The plaintiff would not be permitted to reply, denying the property in such third person, as that would present an immaterial issue. This plea, even alone, does not amount to an admission of the taking, nor does it shift the burden of proof to the defendant. It denies that the plaintiff had the right to deliverance, and upon this issue the burden of proof is upon the plaintiff.⁵ But if the plaintiff show, under such plea, that

¹ Hall v. Henline, 9 Ind. 256; Parker v. Mellor, 1 Ld. Raym. 217; Johnson v. Carnley, 6 Seld. (N. Y.) 576; McCurry v. Hooper, 12 Ala. 823; Ingraham v. Hammond, 1 Hill. 353; Harrison v. M'Intosh, 1 John. 380; Prosser v. Woodward, 21 Wend. 209; Schermerhorn v. Van Valkenburgh, 11 Johns. 529; Martin v. Ray, 1 Blackf. (Ind.) 292; Noble v. Epperly, 6 Ind. 415; Schulenberg v. Harriman, 21 Wall. (U. S.) 44; Shuter v. Page, 11 John. 196; Marsh v. Pier, 4 Rawle, 283; Cullum v. Bevans, 6 Har. & J. (Md.) 469; Thompson v. Sweetser, 43 Ind. 312; Loomis v. Youle, 1 Minn. 175; Scott v. Hughes, 9 B. Mon. (Ky.) 104.

² Rogers v. Arnold, 12 Wend. 33; Chambers v. Hunt, 18 N. J. L. 339; Chambers v. Hunt, 22 N. J. L. 553; Van Namee v. Bradley, 69 Ill. 300.

³ Anstice v. Holmes, 3 Denio, 244.

⁴ Anderson v. Dunn, 19 Ark. 650.

⁵ Crosse v. Bilson, 2 Ld. Raym. 1016; Marsh v. Pier, 4 Rawle, 282; Mac-

the defendant had possession of his property, the burden of proof would be shifted on the defendant to show how he came by it.¹ If the plea merely assert title in a stranger, without a traverse of the plaintiff's right, the burden of proof would be on the defendant to show the title as pleaded.

§ 691. **The same.** Where the defendant pleads property in a third person named, he cannot, upon the trial, be permitted to show title in another person not named. He has no right to mislead the plaintiff by pleading one state of facts and attempting to prove another.² It is not necessary that such third person should be a party to the suit;³ and neither the plea nor the finding thereon binds the third party, unless he is in some way connected with the party filing it.⁴

§ 692. **The same.** Right of defendant to a return under this plea. Upon the sufficiency of this plea as a defense no question has ever been raised. But as to whether proof of property in a third person in no way connected with the suit will entitle the defendant to judgment for a return of the goods, without connecting himself with the title of such third person, is a question upon which the cases differ. Many of them hold that the defendant may plead property in a stranger to the suit, and upon this plea may have return of the goods without connecting himself with the title of such stranger. The defendant, it is said, ought to have return, because the possession was illegally taken from him.⁵ Upon a plea in abatement

kinley v. M'Gregor, 3 Whart. 368; *Gentry v. Bargas*, 6 Blackf. 262; *Johnson v. Plowman*, 49 Barb. 472.

¹ *Morris v. Danielson*, 3 Hill, 168.

² *McClung v. Bergfeld*, 4 Minn. 148.

³ *Thompson v. Sweetser*, 43 Ind. 312.

⁴ *Edwards v. McCurdy*, 13 Ill. 496.

⁵ *Parker v. Mellor*, 1 Ld. Raym. 217; *Salkold v. Skelton*, Cro. Jac. 519; *Wildman v. North*, 2 Lev. 92; *Presgrove v. Saunders*, 6 Mod. 81; *Presgrave v. Saunders*, 2 Ld. Raym. 984; *Crosse v. Bilson*, 2 Ld. Raym. 1016. And this rule has been followed in a number of modern cases. *Harrison v. McIntosh*, 1 John. 384; *Walpole v. Smith*, 4 Blackf. 305. "It is not necessary for the defendant, under this plea, to connect himself with the title of the stranger. It is enough for him that the plaintiff does not own it." *Anderson v. Talcott*, 1 Gilm. 371; *Ingraham v. Hammond*, 1 Hill, 353. *Consult Constantine v. Foster*, 57 Ill. 38; *Gotloff v. Henry*, 14 Ill. 384; *Hunt v.*

sustained, the action is suspended for the time. A plea in bar, if successful, destroys the action.¹ It must also be observed that upon judgment on a plea in abatement that the writ be quashed, the return of the goods does not necessarily follow. Return, in fact, is not ordered unless the defendant show that the goods were delivered to the plaintiff on the writ, and that they ought to be returned; and by the old authorities it seems that there is no reason why the defendant cannot assert title in himself and ask return in a plea in abatement.²

§ 693. **Observations upon this rule.** But this cannot be said to be a general rule. A mere trespasser, or one who has obtained possession of goods by his own wrongful act, cannot set up the title of a stranger, and thereby obtain a return of goods wrongfully taken, without in some way connecting himself with the title of the stranger.³

§ 694. **The same.** This point was clearly stated by SCHOLFIELD, J., in a recent Illinois case: "The property, whether in the defendant or a third person, sufficient to sustain a defense, must be such as goes to destroy the interest of the plaintiff in the property in dispute, and which, if existing, would sustain the action; or, in other words, such as would defeat an action of trespass if brought for a wrongful taking, or trover if brought for a wrongful detention." As against a wrong-doer prior rightful possession is sufficient to enable the plaintiff to maintain the action. If the right of the plaintiff is better

Chambers, 1 Zab. 627; Noble v. Epperly, 6 Ind. 414; Prosser v. Woodward, 21 Wend. 205; Johnson v. Neale, 6 Allen, 229; Seibert v. M'Henry, 6 Watts. 303. "When any part of the goods belong to a third person, the defendant is entitled to a verdict for those goods or their value." Morss v. Stone, 5 Barb. 516; Snow v. Roy, 22 Wend. 602; Finchout v. Crain, 4 Hill, 537; Seymour v. Billings, 12 Wend. 285; Williams v. Beede, 15 N. H. 485. Property in defendant, or in a third person, may be pleaded in bar or in abatement. Boies v. Witherall, 7 Me. 162. Wilson v. Gray, 8 Watts. (Pa.) 35, and cases cited. But the plea in bar, and a defense under it, is the more common.

¹ Wallis v. Savil, Lutw. 16.

² Gilbert on Replevin, 126, citing many old cases.

³ Duncan v. Spear, 11 Wend. 54; Rogers v. Arnold, 12 Wend. 30; Brown v. Webster, 4 N. H. 500; Reed v. Reed, 13 Iowa, 5; Dozier v. Joyce, 8 Porter, (Ala.) 303; Stowell v. Otis, 71 N. Y. 36; Gerber v. Monie, 56 Barb. 652; Hoyt v. Van Alstyne, 15 Barb. 568. See Wilkerson v. McDougal, 48 Ala. 518.

than that of the defendant, whatever it may be with regard to the rest of the world, he will recover. If the action can be sustained by one whose title rests in the simple possession of the goods, unquestionably in similar cases the same title would justify a judgment in his favor for a return of the goods, where he occupied the position of defendant.¹ This decision is abundantly sustained by the authorities. It follows the leading cases wherever this question has been raised,² and is in harmony with the rule in trover, which is in this respect substantially like replevin; the defendant, a wrong-doer, cannot set up title in a third person to defeat the plaintiff's suit, without connecting his title with that of the stranger.³

§ 695. *The same. Illustrations.* In detinue, when the plaintiff has shown a prior possession and made out a *prima facie* case, the defendant cannot defeat his recovery by simply showing an outstanding title in a stranger, with which he in no way connects himself.⁴ In some of the cases cited, the right to possession was alone put in issue. When the plaintiff claims possession, and the right of possession is alone put in issue, the defendant cannot show title in a third party, because that may be consistent with the plaintiff's right of possession. A stranger may have title, while the plaintiff may have the right to present possession.⁵ The defendant cannot set up title in a third person who is shown to acquiesce in the plaintiff's claim.⁶

¹ Van Namee v. Bradley, 69 Ill. 300, closely following Presgrave v. Saunders, 1 Salk. 5. Compare, on this point, Chambers v. Hunt, 22 N. J. L. 553.

² Rogers v. Arnold, 12 Wend. 37; Duncan v. Spear, 11 Wend. 54; Miller v. Jones, Admr., 26 Ala. 248; Gerber v. Monie, 56 Barb. 652; Hoyt v. Van Alstyne, 15 Barb. 568; Stowell v. Otis, 71 N. Y. 36.

³ Dozier v. Joyce, 8 Porter, (Ala.) 315; O'Brien v. Hilburn, 22 Tex. 624; Schermerhorn v. Van Valkenburgh, 11 Johns. 529; Rotan v. Fletcher, 15 Johns. 208. But see Hurst v. Cook, 19 Wend. 463, examining all the early authorities, and holding that in trover plea of property in third person is bad.

⁴ Sims v. Boynton, 32 Ala. 354; Lowremore v. Berry, 19 Ala. 130; McGuire v. Shelby, 20 Ala. 456; Harker v. Dement, 9 Gill. (Md.) 7.

⁵ Reese v. Harris, 27 Ala. 301; Corbitt v. Heisey, 15 Iowa, 296.

⁶ Frost v. Mott, 34 N. Y. 253.

§ 696. **The traverse.** When the defendant pleads property in himself, or in a third person, the plea should contain a "traverse," as it is called.¹ This is simply a denial of the plaintiff's right. It puts him upon proof of his title; to sustain the issues tendered by this plea he is bound to prove his rights as alleged. The traverse, in fact, is the material part of the plea.² This plea should also contain a statement that the property is in the defendant, or in some third person named; this latter averment is regarded only as an inducement to the main issue, which is the denial of the plaintiff's right.³ It is the denial of his right that the plaintiff must answer. He cannot be permitted to waive the denial of his own rights, contained in the plea, and content himself with a denial of the rights asserted by the defendant.⁴

§ 697. **Exceptions to this rule.** There are cases, however, which seem to hold that a plea denying the plaintiff's right may be good without a traverse.⁵ Where a plea contains simply an affirmative allegation that the property is the property of the defendant, or a stranger to the suit, without a denial of the plaintiff's title, the burden of proof will be upon the defendant, who asserts the title;⁶ and this is in harmony with the general rule of pleading in other cases. The burden

¹ *Rogers v. Arnold*, 12 Wend. 34; *Anstice v. Holmes*, 3 Denio, 244; *Pringle v. Phillips*, 1 Sandf. 292; *Prosser v. Woodward*, 21 Wend. 208; *Hunt v. Chambers*, 1 Zab. (21 N. J.) 625; *Robinson v. Calloway*, 4 Ark. 101.

² *Anderson v. Talcott*, 1 Gilm. 371; *Johnson v. Neale*, 6 Allen, (Mass.) 228; *Seibert v. McHenry*, 6 Watts, (Pa.) 303; *Hunt v. Chambers*, 1 Zab. (21 N. J.) 627; *Noble v. Epperly*, 6 Ind. 414; *Dickinson v. Lovell*, 35 N. H. 9.

³ *Gotloff v. Henry*, 14 Ill. 384; *Anderson v. Talcott*, 1 Gilm. 371; *Chandler v. Lincoln*, 52 Ill. 74; *Landers v. George*, 40 Ind. 160; *Parsley v. Huston*, 3 Blackf. 348; *Gentry v. Bargis*, 6 Blackf. 262; *Robinson v. Colloway*, 4 Ark. 101; *Hunt v. Bennett*, 4 G. Greene, (Ia.) 513.

⁴ *Robinson v. Calloway*, 4 Ark. 101; *Constantine v. Foster*, 57 Ill. 36; *Chambers v. Hunt*, 2 Zab. (22 N. J.) 552; *Same v. Same*, 18 N. J. L. 339; *Brown v. Bissett*, 1 Zab. 267; *Reynolds v. McCormick*, 62 Ill. 415; *Richardson v. Smith*, 29 Cal. 529.

⁵ *Johnson v. Neale*, 6 Allen, 228; *Whitwell v. Wells*, 24 Pick. 25; *Love-day v. Mitchell*, Comyns, 248.

⁶ *Chandler v. Lincoln*, 52 Ill. 76; *Harwood v. Smethurst*, 5 Dutch. (N. J.) 196.

of proof is on him who asserts or holds the affirmative of the issue, and if the defendant choose to assert title in himself, without denial of plaintiff's right, he may do so, at the risk of making out the title he asserts.¹

§ 698. **Replication.** In a replication to plea of property in stranger, the plaintiff must simply reaffirm his own title; he is under no obligation to notice the inducement or introductory part of the plea, or the claim that the property belongs to the defendant.² Replication that the goods were delivered to plaintiff by A. for safe keeping, without alleging property in A., is not sufficient. The deposit may have been by one who had no authority or title.³

§ 699. **Surrender to a third party by order of court.** When, during the pendency of the action, and before trial, the defendant has been legally required to deliver the property in dispute to a third person, who is the owner as against both the parties to the suit, such delivery may be pleaded, and will constitute a good defense to the replevin suit. Thus, when the sheriff was sued, by an assignee of the debtor, for goods which he had attached, he filed answer that the assignment was made to hinder, delay and defraud creditors; that the debtor had been adjudged a bankrupt, and that the assignee in bankruptcy had demanded and taken the goods, such answer was regarded a sufficient defense to the replevin suit.⁴ This rule is based upon the idea that, pending the suit, the property is in the custody of the law, and the court has a right to make such disposal of it as it sees proper.

¹ As to evidence to show property in a third person, see *Edmunds v. Leavitt*, 21 N. H. 198.

² *Chambers v. Hunt*, 2 Zab. (22 N. J. L.) 552.

³ *Harrison v. M'Intosh*, 1 Johns. 384.

⁴ *Bolander v. Gentry*, 36 Cal. 109; *Hunt v. Robinson*, 11 Cal. 262; *Cole v. Conally*, 16 Ala. 274; *O'Connor v. Blake*, 29 Cal. 313.

CHAPTER XXII.

PLEA OF NON CEPIT AND NON DETINET.

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<i>Non detinet</i> similar to <i>non cepit</i>	708	so allege it in his plea . .	714

§ 700. Plea of *non cepit* or *non detinet*. By the common law, this action was for the purpose of recovering a distress, and the plaintiff always charges a wrongful taking and detaining. The general issue in such case was, "*non cepit*."¹ Strictly speaking, there is no general issue to the action as usually brought in modern practice; for the reason that the action in almost all cases involves title to the goods, or something more than a simple taking and detaining.² *Non cepit*, however, is unquestionably a good plea, and is the general issue when the charge is for a wrongful taking, only.³ *Non detinet* is the general issue to a charge of wrongful detention,

¹ Bac. Abr. title Replevin and Avowry; Vin. Abr.

² Dole v. Kennedy, 38 Ill. 284; Amos v. Sinnott, 4 Scam. 445; Anderson v. Talcott, 1 Gilm. 371; Gibson v. Mozier, 9 Mo. 258. See Ashby v. West, 3 Porter, (Ind.) 170.

³ In Massachusetts, special pleas in replevin were prohibited. All matters of defense were permitted under plea of not guilty. Miller v. Sleeper, 4 Cush. 370.

but the plea of *non cepit* is no reply to any other charge than that of taking, and *non detinet* is not a proper plea to any charge except for the detention of the goods. These pleas are of the same substantial nature as the plea of not guilty, in trespass. Statutory provisions exist in some of the States by which *non cepit* or *non detinet* puts in issue all material facts, not only the taking and detention, but the right of property.¹ And these decisions will probably be followed in all States having similar statutes.²

§ 701. **Admissions in the pleadings not evidence as to matters previously put in issue.** It is a general rule of pleading, which applies with peculiar force in replevin, where both parties are plaintiffs, that when any particular fact is affirmed upon one side and formally denied upon the other, that fact is in issue; no subsequent admission in the pleading can be used as evidence of the truth of it.³

§ 702. **Issues admitted cannot be denied.** It is also a rule that facts which are formally admitted in the pleading cannot be subsequently denied. The plaintiff having based his cause of action upon an alleged possession in the defendant, cannot afterwards deny such possession, and seek a recovery upon the ground that the defendant never had possession.⁴

§ 703. **Special statutory rules.** There is a provision incorporated into many of the codes, requiring a full statement of all the plaintiff's claim in the complaint, and compelling the defendant to specially deny such matters as he wishes to dispute upon the trial. A provision of the common law system has also been introduced, by which the defendant is regarded as admitting all such matters as he does not in his answer,

¹ *Plainfield v. Batchelder*, 44 Vt. 9; *Loop v. Williams*, 47 Vt. 415; *Walpole v. Smith*, 4 Blackf. (Ind.) 304; *Noble v. Epperly*, 6 Ind. 415; *Timp v. Dockham*, 32 Wis. 151; *Yates v. Fassett*, 5 Denio, (N. Y.) 26; *Loomis v. Foster*, 1 Mich. 165. See, also, *Dillingham v. Smith*, 30 Me. 370.

² *Campbell v. Quinlan*, 3 Scam. 288. In this connection, consult *Little v. Smith*, 4 Scam. 400; *Rigg v. Wilton*, 13 Ill. 15

³ *Harington v. Macmorris*, 5 Taunt. 228; *Edmonds v. Groves*, 2 Mees. & W. 642; *Fearn v. Filica*, 7 M. & G. 513. See *Whitaker v. Freeman*, 1 Dev. (N. C.) 271; *Kirk v. Nowell*, 1 Term R. 261.

⁴ *Kingsbury v. Buchanan*, 11 Iowa, 388.

deny. Where such provisions exist, the pleader must be careful to set out all such matters as he relies upon.

§ 704. **Effect of a plea of non cepit.** The plea of *non cepit* is a proper plea of general issue to a charge of wrongful taking. Its office is to deny the taking.¹ It does not assert title in the defendant; its legal effect is to admit title to the property to be in the plaintiff.² It admits every fact necessary to sustain the plaintiff's action, except the single one of taking.³ Under this plea the defendant cannot prove property in himself;⁴ nor in a stranger;⁵ nor give evidence of a justification;⁶ nor ask a return of the goods;⁷ or, for damages.⁸ But while this plea admits the property to be in the

¹ *Ely v. Ehle*, 3 Comst. 510; *Marshall v. Davis*, 1 Wend. 115; *Rogers v. Arnold*, 12 Wend. 34; *Seymour v. Billings*, 12 Wend. 286; *Trotter v. Taylor*, 5 Blackf. 431; *Carroll v. Harris*, 19 Ark. 238; *Wilson v. Royston*, 2 Ark. 315; *D'Wolf v. Harris*, 4 Mason, (C. C.) 528; *Hunt v. Chambers*, 1 Zab. (21 N. J.) 624; *Sanfd. Mf. Co. v. Wiggin*, 14 N. H. 446; *Anderson v. Talcott*, 1 Gilm. 365; *Whitwell v. Wells*, 24 Pick. 28; *Miller v. Sleeper*, 4 Cush. 370; *McFarland v. Barker*, 1 Mass. 153.

² *Coit v. Waples*, 1 Minn. 134; *Ringo v. Field*, 1 Eng. (6 Ark.) 43; *Trotter v. Taylor*, 5 Blackf. 431; *Douglas v. Garrett*, 5 Wis. 88; *Hopkins v. Burney*, 2 Fla. 46; *Galusha v. Butterfield*, 2 Scam. 227; *Sanfd. Mf. Co. v. Wiggin*, 14 N. H. 446; *Green v. Dingley*, 24 Me. 137; *Sawyer v. Huff*, 25 Me. 465; *Moulton v. Bird*, 31 Me. 297; *Van Namee v. Bradley*, 69 Ill. 299; *Johnson v. Woolyer*, 1 Str. 507; *Bemus v. Beckman*, 3 Wend. 672; *Bourk v. Riggs*, 38 Ill. 321; *Vose v. Hart*, 12 Ill. 378; *Warner v. Matthews*, 18 Ill. 83; *Chandler v. Lincoln*, 52 Ill. 74; *Amos v. Sinnott*, 4 Scam. 445; *Hanford v. Obrecht*, 49 Ill. 151; *Mitchell v. Roberts*, 50 N. H. 490.

³ *Ely v. Ehle*, 3 Comst. (N. Y.) 510.

⁴ *Smith v. Snyder*, 15 Wend. 327; *Miller v. Sleeper*, 4 Cush. (Mass.) 370.

⁵ *Vickery v. Sherburne*, 20 Me. 35.

⁶ *McFarland v. Barker*, 1 Mass. 153.

⁷ *Butcher v. Porter*, 1 Salk. 94; *Simpson v. McFarland*, 18 Pick. 427; *Holmes v. Wood*, 6 Mass. 1; *Bourk v. Riggs*, 38 Ill. 321; *Seymour v. Billings*, 12 Wend. 286; *Vose v. Hart*, 12 Ill. 378; *Hopkins v. Burney*, 2 Fla. 47; *Moulton v. Bird*, 31 Me. 297.

⁸ *Douglass v. Garrett*, 5 Wis. 88. Where the issue is upon the plea of *non cepit* alone, if found for the defendant, he is not entitled to a return. *Underwood v. White*, 45 Ill. 438. "If the defendant claim a return, he must add an avowry." *Hopkins v. Burney*, 2 Fla. 47. "It puts in issue nothing but the caption and the place, where, etc. Under this plea, the defendant cannot show property out of the plaintiff." *Wilson v. Royston*, 2 Ark. 315; *D'Wolf v. Harris*, 4 Mason, 528; *Pangburn v. Patridge*, 7 John. 142.

plaintiff, it denies his right to damages;¹ and under this plea the defendant cannot ask damages. It would be absurd to renounce all claim to the property, and then claim damages.² If the defendant desires to claim damages, he must add a plea setting up a right in himself.³ Under this issue, the plaintiff must prove an unlawful taking substantially at the time and place laid in the declaration.⁴

§ 705. **Form of plea of non cepit.** The usual form of the plea of *non cepit* is, *non cepit modo et forma*. This puts in issue not only the taking, but the taking at the time and place mentioned in the declaration. If the defendant desires to present this issue, and to have a return of the goods, he should avow and justify the taking, or in some way set up a right to the goods and ask a return.

§ 706. **Other pleas may be joined with.** The defendant may join as many other pleas with *non cepit* as he deems proper. They are not required to be consistent with each other. Thus, he may plead *non cepit*, set up his right to distrain, claim ownership of the premises where the distress was made, or title in himself or in a stranger.⁵ This rule, permitting the defendant to file several pleas was originally given by statute

¹ Hopkins v. Burney, 2 Fla. 45.

² Hopkins v. Burney, 2 Fla. 45; Douglass v. Garrett, 5 Wis. 88.

³ Smith v. Snyder, 15 Wend. 324. "The plea only involves the taking and the place, not the title to the property." Seymour v. Billings, 12 Wend. 286. "This plea admits every fact necessary to maintain the action except the taking; that fact being proven, the plaintiff maintains the issue. If the defendant has any justification or excuse, he must plead it." Ely v. Ehle, 3 Comst. 510; People v. Niagara C. P., 4 Wend. 217. Neither *non cepit* nor *non detinet* denies the property in the plaintiff. Chandler v. Lincoln, 52 Il. 76.

⁴ Simpson v. McFarland, 18 Pick. 429; Badger v. Phinny, 15 Mass. 359; Baker v. Fales, 16 Mass. 147; Marston v. Baldwin, 17 Mass. 606. A wrongful possession is regarded as equivalent to a wrongful taking; so, also, is obtaining possession from one who had no authority. Gray v. Nations, 1 Ark. 566. And, see Sawyer v. Huff, 25 Me. 465; Marshall v. Davis, 1 Wend. 115, Barrett v. Warren, 3 Hill, 348.

⁵ McPherson v. Melhinch, 20 Wend. 671; Simpson v. McFarland, 18 Pick. 427; Whitwell v. Wells, 24 Pick. 29; Mt. Carbon, etc. v. Andrews, 53 Ill. 184; McFarland v. Barker, 1 Mass. 153; Shuter v. Page, 11 Johns. 196; Paul v. Luttrell, 1 Col. 319.

4 Anne, C. 16, A. D. 1706, and has been the constant practice since that time. The approved doctrine is, that an admission of a state of facts in one plea cannot be taken as evidence of the existence or non-existence of those facts, if denied in any other.¹

§ 707. **Plea of cepit in alio loco.** The plea of *cepit in alio loco*, (took, but in another place,) is proper in justification for a distress for damage feasant, or for rent, but is not applicable to other cases.² If the defendant ever had the cattle at the place named in the declaration, even if only in leading them to the pound, he should avow accordingly.³ It must be followed by an avowry or cognizance, or by some justification of the taking, or it is no defense, as the plea admits the taking, and must justify, or admit that it was wrongful.⁴

§ 708. **Non detinet similar to non cepit.** The plea of *non detinet* is exceedingly like *non cepit*. It is governed by the same general rules and principles, and puts in issue simply the charge of wrongful detention.⁵ It has been said, with much force, that *non detinet* is a proper plea to a charge of wrongful taking; that the plaintiff must establish a detention, even when his charge was for taking; that the detention is a material fact to be shown, and that this plea is proper.⁶

§ 709. **The same. Illustrations.** In Indiana, where the complaint alleged that the plaintiff was the owner, and entitled to the possession of the property "which the defendant has possession of without right, and unlawfully detained from the plaintiff," the defendant replied, denying the unlawful detention. The denial of the detention was held to tender a proper issue.⁷ In Illinois this same point was decided the other way. The declaration contained but one count; that was for the

¹ Edmonds v. Groves, 2 Mees. & W. 642; Harington v. Macmorris, 5 Taunt. 232.

² Lougee v. Colton, 9 Dana, (Ky.) 123.

³ Ch. Plea, Vol. 1, p. 499; Snow v. Como, Str. Rep. 507; Sawyer v. Huff, 25 Me. 465; Amos v. Sinnott, 4 Scam. 445.

⁴ Gilbert on Rep. p. 129.

⁵ Chandler v. Lincoln, 52 Ill. 74; Simmons v. Jenkins, 76 Ill. 497; Ferrell v. Humphrey, 12 Ohio, 113; Oaks v. Wyatt, 10 Ohio, 341.

⁶ Paul v. Luttrell, 1 Col. 317.

⁷ Riddle v. Parke, 12 Ind. 89.

wrongful taking and detention. The defendant pleaded *non detinet* and other pleas. The court said, the wrongful taking alleged in the declaration was traversable, and the defendant admitted it by denying the wrongful detention only.¹

§ 710. **The same. Observations.** The statutes under which these cases arose are in substance the same, but the conflict is not so serious as may at first appear. In the Illinois case the court followed the approved doctrine that the averment of taking was not answered by the plea of *non detinet*, and was therefore admitted. It does not follow, however, from anything appearing in that case, that the defendant would not have been permitted, under the plea of *non detinet*, to have shown that he had returned the goods before suit brought, had he chosen to take upon himself the burden of such proof. The Colorado case holds, in substance, that the burden of proof of the detention would have been upon the plaintiff.² The declaration, in that case, charged simply the taking, and not the detention. The conclusions drawn from these cases may not be warranted, but no other mode is perceived of harmonizing the seeming differences they present.

§ 711. **Disclaimer of interest in property no defense.** The defendant cannot avoid an action of replevin by a disclaimer of any interest in the property. This is no answer to the declaration, and is no reason for dismissing the suit. He may be guilty of a wrongful taking, or wrongfully detaining, notwithstanding his disclaimer. Such an instrument was properly stricken from the files.³

§ 712. **Plea of justification; the burden is upon the party alleging it.** Where the defendant justifies the taking under process, filing no other plea, the burden is upon him to sustain his plea.⁴

¹ *Simmons v. Jenkins*, 76 Ill. 480.

² Where the declaration was for the wrongful taking and detention, there was no plea of *non cepit*, but pleas of property in a third person, upon which issue was taken. The pleading was considered as admitting the taking and detention. The burden of proof was then upon the defendant to establish the truth of his pleas. *Kern v. Potter*, 71 Ill. 19.

³ *Smith v. Emerson*, 16 Ind. 355.

⁴ *Hobbs v. Myres*, 1 B. Mon. (Ky.) 241.

§ 713. **General rules governing plea of non detinet.** The rules governing pleas of *non detinet* are similar in principle to those applicable to pleas of *non cedit*. Under the issue formed by this plea, the plaintiff must prove his right to immediate and exclusive possession of the goods and the wrongful detention by the defendant.¹ While the defendant may show that he had returned the goods before suit, or that he never had them, he cannot, under this plea alone, if successful, have a return of the goods.² *Non detinet* admits the right of property to be in the plaintiff.³ Under it the plaintiff must prove a wrongful detention by defendant, and his right to immediate possession.⁴ The plea of *non detinet*, by statute, in some of the States, puts in issue the property in the plaintiff, as well as the wrongful detention, and under such plea the defendant is presumed to assert all the rights which the statute confers upon such plea.⁵ A return may therefore be awarded under such a statute upon a plea of *non detinet*.⁶ In Wisconsin, under this plea, defendant may prove his right to the possession or his title to the property.⁷

§ 714. **Writ not dismissed for neglect of officer.** Within certain limitations, failure of an officer to do his duty will not defeat the rights of a party not in fault. The wrongful levy by an officer, as we have seen, does not deprive the owner of his goods.⁸ When the writ is technically defective by mistake of the clerk, a return is not usually ordered, but the plaintiff may retain possession,⁹ though this would not settle the question of title. So, where the sheriff was by law required to have the goods appraised, and allowed the defendant to give

¹ *Amos v. Sinnott*, 4 Scam. 445; *Rogers v. Arnold*, 12 Wend. 30.

² *Johnson v. Howe*, 2 Gilm. 345.

³ *Ingalls v. Bulkley*, 15 Ill. 225. *Contra*, by statute, in some States, *Walpole v. Smith*, 4 Blackf. 304; *Kennedy v. Shaw*, 38 Ind. 474; *Timp v. Dockham*, 32 Wis. 151; *Yates v. Fassett*, 5 Denio, 26.

⁴ *Amos v. Sinnott*, 4 Scam. 445. It admits the property to be in plaintiff, and defendant cannot claim return. *Wells v. McClenning*, 23 Ill. 410.

⁵ *Walpole v. Smith*, 4 Blackf. 304; *Yates v. Fassett*, 5 Denio, 26.

⁶ *McKnight v. Dunlop*, 4 Barb. 36. See *Loop v. Williams*, 47 Vt. 415.

⁷ *Dimond v. Downing*, 2 Wis. 498; *Emmons v. Dowe*, 2 Wis. 322.

⁸ See, *ante*, § 260, *et seq.*

⁹ See, *ante*, § 501.

bond and have a return of them if he wished, and the officer did not have the goods appraised, and no opportunity was given to the defendant to give the statutory bond and have return, this does not authorize a dismissal of the writ. The officer may be liable in such case, but the plaintiff should not be made to suffer.¹ So, when an officer makes an unauthorized levy and sale of goods, the owner does not lose his goods, but may replevy them from the purchaser.²

¹ *Parlin v. Austin*, 3 Col. 337.

² *Samuel v. Agnew*, 80 Ill. 554; *Combs v. Gordon*, 59 Me. 111; *Pierce v. Benjamine*, 14 Pick. 356.

CHAPTER XXIII.

REPLEVIN OF A DISTRESS.

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§ 715. **The right of distress.** Replevin is the ancient remedy for the recovery of goods wrongfully seized by way of distress. It does not fall within the scope of this work to discuss at length the law of distress or the rights of the landlord and tenant. Such a discussion more properly belongs to a treatise upon that subject. Mere mention of the law of distress as showing the foundation upon which to base the replevin, must suffice.

§ 716. **Origin of the right.** The power of distress was given to the lord in lieu of a forfeiture of the land. This was done for the purpose of compelling the tenant to pay the rent or perform the services due. Lands, originally, were occupied by bondsmen, who were themselves the property of the lord,

and not capable of owning real estate. As these serfs became enfranchised, the right to the use of the soil became the right of the tenant, but the rents were the property of the landlord, and he continued to collect them by his own authority, for in theory of the law in olden time no man needed the aid of a judge to take what was his own.¹ In process of time the goods came to be regarded as the property of the tenant. The landlord, however, had the right to seize and hold them as a pledge or security to compel the tenant to perform the services or pay the rent. By common law the landlord had no right to sell the distress; he could only hold it as a pledge or security. The statute, 2 W. & M. C. 5, gave the lord authority, under certain conditions, to sell the distress. This remedy was very mild compared with the severity of the older law, which allowed a forfeiture by which the lord would seize the land and turn the tenant out, thus stripping him of the entire fruits of his labor.² This power of distress extended not only to the crops, but everything on the land was equally liable. This right became an instrument of great oppression and many statutes were enacted to remedy the evils, until at length the tenant was permitted to show that the taking was wrongful and to give bonds to make that appear, upon which he was allowed to have his goods restored to him; that is, he was permitted to take back the pledge. This was *replegari* or replevin. Replevin would originally lie in no other case than to recover a distress wrongfully taken.³

§ 717. **The right to replevy the distress.** When the distress was for any cause wrongful, the action of replevin was given to the tenant, to enable him to recover it.

§ 718. **Right of distress in this country.** The law of distress has been very generally adopted in this country.⁴ It never existed in North Carolina.⁵ In Georgia it can only issue upon the oath of the landlord; the oath of an agent is

¹ Taylor on Landlord and Tenant, § 557, and the cases cited.

² Bradby on Distresses, 6.

³ See, *ante*, § 41, *et seq.*

⁴ *Woglam v. Cowperthwaite*, 2 Dall. (Pa.) 68; *Ridge v. Wilson*, 1 Blackf. 409; *Burket v. Boude*, 3 Dana, 209; *Penny v. Little*, 3 Scam. (Ill.) 301.

⁵ *Dalgleish v. Grandy*, Cam. & N. (N. C.) 22.

not sufficient.¹ It was abolished in New York by statute, May, 1846.² It does not exist in Missouri.³ Formerly distress was permitted of all goods found on the premises, whether they belonged to the tenant or to another person. This rule, however, has now been overturned in all or nearly all the States,⁴ and by statutory modifications the manner of enforcing the remedy has been greatly changed.

§ 719. **Distress not a suit at law.** Distress is not a suit at law. The landlord distraining empowers some one as his bailiff to seize goods of the tenant of sufficient value to pay the rent. Upon such seizure being made, it is the duty of the bailiff to make an inventory and file it in the proper court. Upon this being done the court proceeds to enquire if the relation of landlord and tenant exists, and if so, the amount of rent due to the landlord for rent,⁵ and the amount so found due is certified by the court. No judgment is rendered and no execution is issued,⁶ but a certificate is issued by the court to the bailiff of the finding, which constitutes his authority to sell.⁷ The reason for this is found in the fact that originally the rent was the property of the lord. His rights were superior to the tenant's in all the property until his rent was paid in full. The distress was a taking by the lord or by his authority; and this idea so far continues to invest this proceeding, that the courts only interfere to ascertain that the relation of landlord and tenant actually exists, and the amount of rent due.

§ 720. **Replevin of a distress.** Replevin was a suit at law,

¹ Howard v. Dill, 7 Ga. 52. *Contra*, in Kentucky, Mitchill v. Franklin, 3 J. J. Marsh. 477.

² Guild v. Rogers, 8 Barb. 502.

³ Crocker v. Mann, 3 Mo. 472.

⁴ Powers v. Florance, 7 La. Ann. 524; Gray v. Rawson, 11 Ill. 527; Owen v. Boyle, 22 Me. 47; Hall v. Amos, 5 T. B. Mon. (Ky.) 89. See Allen v. Agnew, 4 Zab. (N. J.) 443; Briggs v. Large, 30 Pa. St. 287; Riddle v. Weldon, 5 Whart. 9. But, *contra*, see and compare Coburn v. Harvey, 18 Wis. 147; Laws of Wis., 1866; Trieber v. Knabe, 12 Md. 149.

⁵ Bull N. P. 181; Sketoe v. Ellis, 14 Ill. 75.

⁶ Towns v. Boarman, 23 Miss. 186; Richardson v. Vice, 4 Blackf. 13; Ferguson v. Moore, 2 Wash. (Va.) 54.

⁷ Sketoe v. Ellis, 14 Ill. 75.

to test the right of distress. If the tenant had offered security,¹ or if, for any cause, the distress was wrongful, the tenant might, upon this writ, have his goods restored to him, upon giving bond to show the taking was illegal.² The plaintiff was under no obligation to bring the rent tendered into court, as the question was not upon the tender, but whether the defendant was a trespasser. Bringing the money into court would have no bearing upon the question as to whether the defendant acted rightfully in making the distress, or was a trespasser.³ Proof of the tender was sufficient. A tender of rent before distress makes the taking unlawful.⁴ A tender after distress, and before impounding, makes the subsequent detention unlawful.⁵ In either of these cases, the tenant may sustain replevin for the goods distrained. So, where there was no rent due, or when the distress was for services which the tenant was not bound to render, or when the distress was of beasts of the plow, when other goods could be found, and in some other cases, the distress was wrongful;⁶ or, in modern times, where the distress is of goods by law exempt from seizure, in all these cases the tenant may sustain replevin.

§ 721. **Rights of the landlord.** Where any part of the rent is due and unpaid, the landlord has a right to distrain.⁷ The fact that the distress was excessive or oppressive will not defeat his action, nor authorize the tenant to recover in replevin; though, for a grossly excessive distress, trespass might lie.⁸ Where the property distrained is exempt by statute, the tenant may replevy; but he must make that the ground of his suit; and where the distress is for more rent than is due the

¹ *Hilson v. Blain*, 2 Bailey, (S. C.) 168; *Ante*, § 5, *et seq.*

² *Kimball v. Adams*, 3 N. H. 182; *Gilbert on Replevin*.

³ *Hunter v. La Conte*, 6 Cow. 730; *Horne v. Lewin*, 1 Ld. Raym. 639; S. C., 2 Salk. 583.

⁴ *Gilbert on Replevin*, 61.

⁵ *Firth v. Purvis*, 5 T. Rep. 227 and 432; *Six Carpenters' Case*, 8 Coke R. 146; S. C., 1 Smith's Ld. Cases, 62; *Browne v. Powell*, 4 Bing. 230; *Hunter v. La Conte*, 6 Cow. (N. Y.) 728.

⁶ *Bradby on Distress*, 259.

⁷ *Hare v. Stegall*, 60 Ill. 380; *Lindley v. Miller*, 67 Ill. 248; *Smith v. Fyler*, 2 Hill. (N. Y.) 648; *Bates v. Nellis*, 5 Hill, (N. Y.) 651.

⁸ *Ib.* See *Smith v. Colson*, 10 Johns. 91; *Bowser v. Scott*, 8 Blackf. 86.

landlord, or the officer who executes the warrant, he is liable to the tenant in an action.¹ The taking of other security does not defeat the landlord's right of distress.² Nor is a previous demand for the rent usually necessary.³

§ 722. **Sub-lessor's liability.** Where a sub-lessor has his goods distrained by the landlord of his landlord, he cannot sustain replevin by proving payment to the party from whom he leased.⁴ This rule, however, is not universal in its application. Any one of several joint tenants may distrain for the whole rent, or appoint a bailiff for the others; but the avowry in such case must lie for all.⁵

§ 723. **Payment to landlord who is a joint tenant.** Where the tenant leases from tenants in common, payment of rent to one is not necessarily a discharge of the rent; the others may distrain for their share.⁶

§ 724. **Rights of the tenant.** The landlord cannot distrain twice for the same rent, where the first distress was upon goods sufficient to pay the rent, even when the first distress was voluntarily abandoned;⁷ nor where he might have taken sufficient at first.⁸ The law will not suffer the tenant to be needlessly vexed. The landlord cannot distrain fixtures of the tenant,⁹ or chattels in the actual use of the tenant or other person, or goods delivered to the tenant to be worked up in his trade for another;¹⁰ nor goods which are by law exempt; nor articles worn upon the person of the defendant;¹¹ nor can a distress be permitted to take chattels after they have been actually levied

¹ *McElroy v. Dice*, 17 Pa. St. 163.

² *Bates v. Nellis*, 5 Hill, (N. Y.) 651.

³ *Mallam v. Arden*, 10 Bing. 299; *Giles v. Elsworth*, 10 Md. 333.

⁴ *Quinn v. Wallace*, 6 Whart. (Pa.) 452.

⁵ *Taylor, L. & T.* 419. See *Robinson v. Hofman*, 4 Bing. 563.

⁶ *Decker v. Livingston*, 15 Johns. 479. See *Robinson v. Hofman*, 4 Bing. 562.

⁷ *Dawson v. Cropp*, 1 Man. G. & S. 962. See *Ridge v. Wilson*, 1 Blackf. (Ind.) 409.

⁸ *Wallis v. Savill*, 2 Lutw. 493.

⁹ *Gorton v. Falkner*, 4 Durnf. & E. 567.

¹⁰ *Gisbourne v. Hurst*, 1 Salk. 249; *Thompson v. Mashiter*, 1 Bing. 283; *Gibson v. Ireson*, 43 E. C. L. 621.

¹¹ *Maxham v. Day*, 16 Gray, (Mass.) 213.

on and taken by an officer with valid execution against the tenant. But the right of distress is not lost by a receipt in full for all rent due, when the only payment for which the receipt was given was an order on a third person, who had no funds of the person ordering.¹ Neither can distress be made on the day the rent falls due; the tenant has the whole of that day in which to pay.²

§ 725. **The avowry and cognizance.** Where the distress is for any cause wrongful, the tenant may replevy the goods. If the landlord wishes to contest the replevin and to secure a return of the goods, he must avow; or if the distress was made by a bailiff, he must make cognizance, and so set up the justness of the taking. These were originally the most important, and, in fact, almost the only pleadings of the defendant in replevin. They are still common in cases of replevin of a distress.³ But the comparative infrequency of such cases has reduced the use, as well as the importance of these pleas. There seems to be a distinction between an avowry by joint tenants and tenants in common. Joint tenants must join in an avowry; tenants in common must sever. Each should avow for his share.⁴ If one tenant in common should release, it is no discharge as to the others.⁵

§ 726. **Distinction between an avowry and cognizance.** An avowry was where the defendant admitted the taking and justified under some right of distress, as for rent due, and demanded a return of the goods. When the defendant sets up a taking by distress in his own right it is called an avowry. When he justifies under the right of another, by whose authority he acted, it is called cognizance; the former is called an avowant; the latter a cognizor. The difference between them is formal only. When by mistake a party avowed when he should have

¹ *Printems v. Helfried*, 1 Nott & McC. (S. C.) 187.

² *Gano v. Hart*, Hardin, (Ky.) 297; *Johnson v. Owens*, 2 Cranch. C. C. 160.

³ *Howard v. Black*, 49 Vt. 10; *Lindley v. Miller*, 67 Ill. 244; *Simpson v. McFarland*, 18 Pick. 430; *Quincy v. Hall*, 1 Pick. 361.

⁴ *Stedman v. Bates*, 1 Ld. Raym. 64; *Harrison v. Barnby*, 5 Term, 246; *Cully v. Spearman*, 2 H. Bla. 386.

⁵ *Decker v. Livingston*, 15 Johns. 480.

made cognizance, the mistake was immaterial and amendable without delay.¹

§ 727. **The exactness required in these pleas.** By an avowry or by making cognizance the defendant becomes a plaintiff, that is, he sues for the right to distrain; his pleading is in the nature of a declaration; and, therefore, as much strictness is required in such pleading as in a declaration; it must be good in every-particular.² The right to distrain was an extraordinary power; the authority upon which it was made was required to be specifically shown in the pleading which attempted to justify it,³ and required to be sustained by proof.⁴ An avowry or cognizance must admit the taking in express terms, though if it contain an implied admission it will be good after verdict without an admission in terms.⁵

§ 728. **The same. Substance of these pleas.** By this pleading the avowant must state sufficient to make good his right of seizure against the plaintiff who is admitted to be the real owner of the goods. The avowant asserts and defends upon his right to seize the goods, and states the grounds of the right in his avowry.⁶ Formerly the avowry was required to show that the avowant, or some one from whom he inherited the estate out of which the rent of the land arose was seized, and also to show the lease under which the plaintiff in replevin held from the avowant, as well as rent due and in arrear. But after alienations became frequent, and of small parcels of land, the fines to the lord therefor were not always paid; consequently the lord did not always know who his tenants were. By Statute 21 Henry VIII., Ch. 19, § 3, the lord was permitted to avow for a distress taken within his fee, and by 11

¹ *Brown v. Bissett*, 1 Zab. (21 N. J.) 46; *Wheadon v. Sugg*, Cro. Jac. 373.

² *Pike v. Gandell*, 9 Wend. 149; *Wright v. Williams*, 2 Wend. 632; *Yates v. Fassett*, 5 Denio, 31; *Crosse v. Bilson*, 6 Mod. 103; *Coan v. Bowles*, 1 Show. 165.

³ *Goodman v. Aylin*, Yelv. 148; *Hawkins v. Eckles*, 2 Bos. & Pul. 359; *Weeks v. Peach*, 1 Salk. 179; *Saine v. Same*, 1 Ld. Raym. 679; *Gilbert on Rep.* 133, 144; *McPherson v. Melhinch*, 20 Wend. 671.

⁴ *Lavigne v. Russ*, 36 Miss. 326; *Waltman v. Allison*, 10 Pa. St. 465.

⁵ *Gaines v. Tibbs*, 6 Dana, (Ky.) 144.

⁶ *Hellings v. Wright*, 14 Pa. St. 375; *Simcoke v. Frederick*, 1 Ind. 54; *Trulock v. Rigsby*, Yelv. 185; *Godfrey v. Bullin*, Yelv. 180.

George II., Ch. 19, § 22, to avow generally, without setting up his title; still he was required to aver title and seizure.¹ It was still necessary, also, to set out the lease, and to state amount of rent reserved and when payable,² and to show that the landlord was seized of the premises, and that the relation of landlord and tenant existed;³ so an avowry by three and proof of a demise by one of them, is not sufficient.⁴

§ 729. **The rent; how payable; must be certain.** The rent was not necessarily payable in money,⁵ but might be payable in services,⁶ or anything susceptible of valuation⁷ which was certain, or which might be reduced to a certainty;⁸ but unless there was a certain rent there was no right to distrain.⁹ The time for payment must also be fixed, unless the rent was fixed and in amount, and unless the time for payment was certain the tenant could never know how much or when to pay, and so could not be in default.¹⁰

§ 730. **The terms of the lease.** An avowry for rent should state the terms of the lease as they will appear in proof,¹¹ the amount of rent, and when it was due.¹² It must set out the holding from the plaintiff; it need not state the plaintiff's title,¹³ but it must show that there was a tenancy and the avow-

¹ *Harrison v. McIntosh*, 1 Johns. 384; *Franciscus v. Reigart*, 4 Watts, 117; *Taylor v. Moore*, 3 Har. (Del.) 6.

² *Forty v. Imber*, 6 East. 434; *Caldwell v. Cleadon*, 3 Har. (Del.) 420; *Scott v. Fuller*, 3 Pa. 55; *Gilbert on Rep.*, 133, *et seq.*; *Helser v. Pott*, 3 Barr. (Pa.) 179; *Valentine v. Jackson*, 9 Wend. 302; *Steele v. Thompson*, 3 Penn. 34; *Philpott v. Dobbinson*, 6 Bing. 104.

³ *Bain v. Clark*, 10 Johns. 424.

⁴ *Ewing v. Vanarsdale*, 1 S. & R. (Pa.) 370.

⁵ *Myers v. Mayfield*, 7 Bush, (Ky.) 212.

⁶ *Valentine v. Jackson*, 9 Wend. 302; *Smith v. Colson*, 10 John. 91.

⁷ *Fraser v. Davie*, 5 Rich. (S. C.) Law, 59.

⁸ *Valentine v. Jackson*, 9 Wend. 302.

⁹ *Grier v. Cowan*, Addis, (Pa.) 347; *Myers v. Mayfield*, 7 Bush. (Ky.) 212; *Smith v. Fyler*, 2 Hill, 648.

¹⁰ *Wells v. Hornish*, 3 Pen. & W. (Pa.) 30.

¹¹ *Phipps v. Boyd*, 54 Pa. St. 342; *Taylor v. Moore*, 3 Har. (Del.) 6; *Tice v. Norton*, 4 Wend. 667.

¹² *Wells v. Hornish*, 3 Pen. & W. (Pa.) 30.

¹³ *Decker v. Livingston*, 15 Johns. 479; *Wright v. Mathews*, 2 Blackf. 187.

ant was the landlord.¹ It must also show the amount of rent and that it is due and in arrear.² It need not state the exact amount due, as that is not necessary to a certain and definite description of the contract,³ the object of this certainty being to state the contract with certainty, so that it may be introduced in proof.

§ 731. **The usual plea to replevin of a distress.** In cases where the replevin is for a distress for rent, avowry seems to be the proper and regular mode of pleading⁴ at the present time; and the rules substantially as before stated apply. It has been said that the avowry should state that the goods seized were those of the plaintiff, but in point of fact this is immaterial and need not be proved, as the landlord has the right in many cases to distrain goods of persons other than the tenant, provided they are found upon the premises.⁵ It is, however, necessary to allege that the goods were seized upon the premises, or within the limits where distress is permitted, and that they are liable to distress.⁶ Joint tenants must join in an avowry,⁷ but tenants in common must avow severally.⁸

§ 732. **Form of avowry or cognizance.** An avowry or cognizance need not show that the distress was made by an

¹ *Nicholas v. Dusenbury*, 2 Comst. 287.

² *Smith v. Aurand*, 10 S. & R. 93; *Wright v. Williams*, 5 Cow. 345; *Lander v. Ware*, 1 Strobh. (S. C.) 15.

³ *Barr v. Hughes*, 44. Pa. St. 517.

⁴ *Williams v. Smith*, 10 S. & R. (Pa.) 202; *Weidel v. Roseberry*, 13 S. & R. 178; *Hill v. Stocking*, 6 Hill, 277; *Lindley v. Miller*, 67 Ill. 244. The defendant sought to justify his taking a distress for rent; instead of the usual form of avowry he has adopted the form of a plea in bar, and seeks by this departure from the precedents to deprive the plaintiff of more than one answer to each justification. The experiment cannot succeed. *McPherson v. Melhinch*, 20 Wend. 671.

⁵ *Musprat v. Gregory*, 3 Mees. & W. 677; *Spencer v. M'Gowen*, 13 Wend. 256; *Blanche v. Bradford*, 38 Pa. St. 344. This was the common law, but it has been thought necessary to repeal or modify it in most of the States of the Union.

⁶ *Asbell v. Tipton*, 1 B. Mon. (Ky.) 300.

⁷ *Stedman v. Bates*, 1 Ld. Raym. 64.

⁸ *Bradby on Distress*, 62; *Harrison v. Barnby*, 5 Term R. 246. See *Jones v. Gundrim*, 3 W. & S. (Pa.) 531.

officer, or that any affidavit was attached to the warrant of distress; even when such affidavit is required by statute, it does not form any part of the pleadings.¹

§ 733. **Pleas to an avowry or cognizance.** An avowry or cognizance partakes of the nature of a declaration, as well as a plea. So far as it is an answer to the plaintiff's claim it is a plea; so far as it demands a return it is in the nature of a declaration: the plaintiff may plead as many separate defenses to it as he deems proper,² and to an avowry he may plead an abuse of the defendant's proceedings, or that they have been irregular.³ Plea to an avowry is governed by the rules applicable to other pleas to declaration; it must answer all it professes to; each plea should only answer one avowry.⁴ The pleas may deny the tenancy set up in the avowry, or may show that the rent is not due; or that the goods are privileged, or exempt from distress; or that the goods are the property of a stranger.

§ 734. **Plea of set-off to an avowry.** The plaintiff in replevin cannot off-set accounts against the distrainer unless it be such matters as grow out of the contract of leasing.⁵ The action is in form an action *ex-delicto*, and seeks damages for the unlawful taking of personal property, and it is no justification for such taking that the defendant is indebted to the plaintiff. The landlord's indebtedness to the tenant would not take away his right to distrain for rent. But this will not prevent the tenant from showing anything which goes to prove that the rent was not due. So, when the landlord leased a tavern and wagon yard, and agreed to put cinders on the yard, and did not do so, it was held the rent was conditioned in part upon the agreement to put the premises in better order, and the damage was allowed to reduce the rent.⁶ But

¹ Webber v. Shearman, 6 Hill. 32.

² Webber v. Shearman, 6 Hill. (N. Y.) 31; McPherson v. Melhinch, 20 Wend. 671.

³ Osgood v. Green, 10 Fost. (N. H.) 210.

⁴ Nichols v. Dusenbury, 2 Comst. 287; Roberts v. Tennell, 4 Litt. (Ky.) 286.

⁵ Beyer v. Fenstermacher, 2 Whart. (Pa.) 95.

⁶ Fairman v. Fluck, 5 Watts, (Pa.) 516.

he may claim damages against the landlord on account of a breach of the contract of leasing,¹ or payment or part payment of the rent;² or may offset any demand against the landlord arising out of the contract of leasing, and properly the subject of recoupment;³ or may plead and show nothing in arrears. But he cannot set off another claim against the landlord; the only questions to be decided in this action relate to tenancy and the rent due.⁴

§ 735. **Pleas to an avowry; averments in.** Plea to an avowry need not allege any place of taking, when the avowry justifies the taking at the place alleged in the declaration.⁵ Plea that the defendant drove the cattle three miles to a public pound, but does not allege a nearer place, is bad.⁶ So a plea to an avowry must show that nothing is in arrear for rent, or it will be defective. When the plea claimed that the landlord had neglected to keep his covenants for repairs, and that the damages resulting therefrom more than equaled the rent, the plea should have so stated; a mere claim of damages, though in several sums, will not be sufficient unless it be followed by an averment that the sums so due equal or exceed the rent claimed; otherwise it will not appear affirmatively but some rent is due.⁷ Defendant avowed and justified the detention under his right of lien as the manufacturer; it was not denied but this was well avowed, but the plea to the avowry set up new matter that the work was done under a contract which precluded a lien; *held*, proper.⁸ Such plea, however, must set up the agreement with certainty.

§ 736. **Plea to cognizance, denying authority of bailiff.** Where the defendant made cognizance as bailiff to J., the plaintiff pleaded that he was not Bailiff J. The plea was held

¹ *Lindley v. Miller*, 67 Ill. 244.

² *Sapsford v. Fletcher*, 4 Term. R. 512; *Wolgatnot v. Bruner*, 4 Har. & McH. (Md.) 70 and 89.

³ *Streeter v. Streeter*, 43 Ill. 155.

⁴ *Anderson v. Reynolds*, 14 S. & R. 439.

⁵ *Judd v. Fox*, 9 Cow. 262.

⁶ *Adams v. Adams*, 13 Pick. 385.

⁷ *Lindley v. Miller*, 67 Ill. 248.

⁸ *Curtis v. Jones*, 3 Denio, 590.

good; for though it may be that J. had a right to distrain, yet a stranger without his authority could not.¹

§ 737. Plea of "non-tenure," or "nothing in arrear." To an avowry for rent, the defendant (the plaintiff in replevin,) may plead *non tenure*, or nothing in arrear. The former of these pleas denies the tenancy; the latter admits the tenancy, but denies that rent is due.²

§ 738. Same rules apply to cognizance. Substantially the same rules apply to making cognizance as to an avowry, except in the latter case the cognizor sets up the title of the landlord and claims to act as his bailiff, and not in his own right.³

§ 739. Effect of replevin on landlord's lien. We have seen that by distraining the landlord acquires a lien to satisfy the amount of rent due. By replevin the lien of the landlord so acquired is gone; *i. e.*, the tenant, by replevying, retakes his former title, and the landlord must look to the security upon the bond.⁴ The landlord may, however, have judgment for a return of the goods, and under a writ of return he may regain possession; in such case he may sell them to satisfy his lien. As against the plaintiff his lien or right to return may be good, but not as against strangers acquiring title in good faith.⁵

¹ *Trevilian v. Pyne*, 1 Salk. 107.

² *Bloomer v. Juhel*, 8 Wend. 448.

³ *Webber v. Shearman*, 6 Hill, (N. Y.) 31; Ch. Pl.; Steph. Pl. 332, 376.

⁴ *Speer v. Skinner*, 35 Ill. 302; *Bruner v. Dyball*, 42 Ill. 37; *Burkle v. Luce*, 6 Hill, 559; *Woglam v. Cowperthwaite*, 2 Dall. 68, 131; *Acker v. White*, 25 Wend. 614.

⁵ *Burkle v. Luce*, 6 Hill, 558; *Acker v. White*, 25 Wend. 614.

CHAPTER XXIV.

THE VERDICT AND JUDGMENT.

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§ 740. **The verdict.** There is probably no form of action where more exactness is required in the verdict than in replevin. In other actions the issues are usually few and simple, while in replevin they may be numerous and sometimes complex. The verdict, therefore, requires the most careful attention.

§ 741. **Court may correct the form, but cannot change the substance.** The court is authorized, and will, in all cases, when it is necessary, correct mere formal mistakes in the verdict, so as to make it correspond with the true finding of the jury and the form required by law;¹ but cannot correct a verdict so as to change in any way the intention of the jury. Each party has a right to the verdict of the jury upon the issues presented, and if it is not relevant to the issues or erroneous, the court may set it aside, but cannot change it.² Thus the court would have no right to add nominal damages,³ or a statement of the value of the property, after the verdict was rendered.⁴ So, where the verdict is for the plaintiff without finding the sum due, judgment for the sum demanded is error.⁵

§ 742. **The same.** It is in the power of the court, after the verdict has been presented, and before the jury is discharged, to direct them to put it into form, or the court may instruct them to render a more specific verdict, or to pass upon issues duly presented which they have failed to pass upon. Such course is proper, and in many cases necessary.⁶

§ 743. **The jury must pass upon all questions at issue.** The jury are not required to pass upon any questions which are

¹ *Donaldson v. Johnson*, 2 Chand. (Wis.) 160; *O'Brien v. Palmer*, 49 Ill. 73; *Osgood v. McConnell*, 32 Ill. 75; *Patterson v. United States*, 2 Wheat. 221; *Thompson v. Button*, 14 John's R. 86; *O'Keefe v. Kellogg*, 15 Ill. 351.

² *Coit v. Waples*, 1 Minn. 134; *Frazier v. Laughlin*, 1 Gilm. 347; *Moore v. Devol*, 14 Iowa, 112; *Hinckley v. West*, 4 Gilm. 136; *Wallace v. Hilliard*, 7 Wis. 627; *Ford v. Ford*, 3 Wis. 399; *Dunbar v. Bittle*, 7 Wis. 144.

³ *Bemus v. Beekman*, 3 Wend. 671.

⁴ *Wallace v. Hilliard*, 7 Wis. 627; *Taylor v. Hathaway*, 29 Ark. 597; *Eaton v. Caldwell*, 3 Minn. 134.

⁵ *Taylor v. Hathaway*, 29 Ark. 597. Compare *Burhans v. Tibbitts*, 7 How. Pr. Rep. 21, 74.

⁶ *Hunt v. Bennett*, 4 G. Greene, (Iowa,) 515.

not in issue, nor which are admitted by the pleading; but simply upon those which are submitted for their determination.¹

§ 744. **May find for both parties.** Where the plaintiff's claim is for several articles, it may be, and usually is, divisible. The defendant may set up as many separate defenses, material to the issues, as he judges proper, and the verdict may be in favor of the plaintiff for a portion of the property and for the defendant for the remainder,² as the facts and the rights of the several parties require.³

§ 745. **Each party may submit issues to the jury.** The verdict must be responsive to all the issues presented by the pleadings. Each party has a right to submit such material issues by proper pleading as he shall think necessary for the protection of his interests, and has the right to have the jury pass upon them. A failure of the jury to do so will justify the court in setting aside the verdict and granting a new trial. When the plea was *non cepit* and the verdict was "guilty of unjust detention," it did not dispose of the issue tendered in the plea.⁴ When a plea of general issue and plea of property are interposed, a simple finding of "not guilty" is not responsive to the issue. In such cases a *venire de novo* will be ordered.⁵ The proper practice in case the verdict omits to

¹ *Patterson v. United States*, 2 Wheat. 221; *Wilcoxon v. Annesley*, 23 Ind. 287; *Woodburn v. Chamberlin*, 17 Barb. 446; *Dana v. Bryant*, 1 Gilm. 104; *Briggs v. Dorr*, 19 Johns. 95; *Jack v. Martin*, 12 Wend. 316; *Machette v. Wanless*, 1 Col. 225.

² *Hotchkiss v. Ashley*, 44 Vt. 195; *Edelen v. Thompson*, 2 Har. & G. (Md.) 32; *Powell v. Hinsdale*, 5 Mass. 343; *Poor v. Woodburn*, 25 Vt. 235; *Brown v. Smith*, 1 N. H. 36; *Wright v. Mathews*, 2 Black, (Ind.) 187; *Dowell v. Richardson*, 10 Ind. 573; *O'Keefe v. Kellogg*, 15 Ill. 351; *Williams v. Beede*, 15 N. H. 483.

³ *Pratt v. Tucker*, 67 Ill. 346.

⁴ *Bemus v. Beekman*, 3 Wend. 667; *Smith v. Phelps*, 7 Wis. 211; *Heeron v. Beckwith*, 1 Wis. 22; *Ronge v. Dawson*, 9 Wis. 246; *Childs v. Childs*, 13 Wis. 17; *Hanford v. Obrecht*, 38 Ill. 493; *Patterson v. United States*, 2 Wheat. 225.

⁵ *Wallace v. Hilliard*, 7 Wis. 627; *Bemis v. Wylie*, 19 Wis. 318; *Ronge v. Dawson*, 9 Wis. 246; *Smith v. Phelps*, 7 Wis. 211; *Johnson v. Howe*, 2 Gilm. 346; *Rose v. Hart*, 12 Ill. 378; *Smith v. Wood*, 31 Md. 293. A verdict of no cause of action, is not responsive to the issues of taking, detention, and property in defendant. *Ford v. Ford*, 3 Wis. 399.

pass upon all the issues is by a motion for a *venire de novo*, not by a motion for a new trial. A *venire de novo* is granted for a defect appearing upon the record; a new trial for some matter outside of it.¹

§ 746. “Not guilty;” what responsive to. There is, strictly speaking, no plea of general issue in replevin. Where the charge is for taking only, a plea of *non cepit* is equivalent to a general issue; if the charge is for detaining, the plea of *non detinet* has the same effect. A verdict of not guilty would be responsive to either.² When the pleas were, 1, *non cepit*, 2, property in defendant, and, 3, in a stranger, verdict of not guilty was responsive to *non cepit* only, and did not authorize any judgment upon the other pleas.³

§ 747. Statutory exceptions. In some of the States, by statute, the plea of *non detinet* or *non cepit* puts in issue not only the detention, but the right of property in the plaintiff;⁴ while, by the common law, *non cepit* and *non detinet* admit the property to be in the plaintiff, but deny the taking and detention respectively.⁵ Where the statute makes the plea of *non detinet* a denial of property in the plaintiff, a verdict of not guilty upon that plea must be regarded, it would seem, not only as responsive to the issue upon the detention, but upon the question of property as well.

§ 748. In justice court. In a justice court, where the pleadings are oral, the same strictness is not required; and where the case was an appeal from such court, a verdict finding the

¹ *Bosseker v. Cramer*, 18 Ind. 45. When the verdict did not pass upon the whole issue, but left part of the facts denied by the plea unnoticed, it was bad, and judgment was reversed. *Miller v. Trets*, 1 Ld. Raym. 324. A verdict is bad if it vary from the issue submitted in any substantial matter, or if it find only part of the issues submitted. *Patterson v. United States*, 2 Wheat. 225.

² *Dole v. Kennedy*, 38 Ill. 284; *Bourk v. Riggs*, 38 Ill. 321.

³ *Hanford v. Obrecht*, 49 Ill. 151; *Hanford v. Obrecht*, 38 Ill. 493. See, also, *Bemus v. Beekman*, 3 Wend. 667; *Sprague v. Kneeland*, 12 Wend. 164; *Boynton v. Page*, 13 Wend. 432; *Machette v. Wanless*, 1 Col. 225.

⁴ *Ford v. Ford*, 3 Wis. 399; *Timp v. Dockham*, 32 Wis. 151; *Walpole v. Smith*, 4 Blackf. (Ind.) 304; *Noble v. Epperly*, 6 Port. (Ind.) 411; *Plainfield v. Batchelder*, 44 Vt. 9; *Loop v. Williams*, 47 Vt. 415.

⁵ See plea of *non cepit*. *Ante*, Chap. 22.

defendant guilty, though not strictly in form, was regarded as equivalent to finding property in plaintiff.¹

§ 749. **Illustrations of the exactness required in the verdict.** The defendant pleaded that he had not taken or detained the property; also, property in a stranger, and property in defendant; the plaintiff joined issue upon the first, and replied to the second and third pleas. The jury returned a verdict, "we find the property to be in the plaintiff." *Held*, the verdict did not authorize a judgment. It omitted to find whether the property had been taken or detained by the defendant.² A verdict of *non detinet* only establishes the question of detention. It does not find the right of property. The finding may be true, and yet the property may be some other person's than the plaintiff.³ So, upon the issue of *non cepit*, a finding for the defendant only determines the fact that the defendant did not take the property as charged. It does not in any way settle the title. Upon this issue a finding by the jury of an actual wrongful taking by defendant will necessarily entitle the plaintiff to a judgment, because an actual wrongful taking may occur, and yet the taker be the owner of the property.⁴

§ 750. **The same.** Where the title, as well as the right to the possession, is in issue, and the verdict is only as to the right of possession, the issue as to title is not determined, and a new trial should be granted. The title may be in one, and the right of possession in another, and these questions, when submitted, should be passed upon.⁵ When the defendant claimed only a lien upon the goods, and the verdict was silent upon this subject, a new trial was granted.⁶

§ 751. **Finding need not be in express words.** The finding

¹ Jarrard v. Harper, 42 Ill. 457.

² Huff v. Gilbert, 4 Blackf. (Ind.) 19; Smith v. Houston, 25 Ark. 184.

³ Bemus v. Beekman, 3 Wend. 668; Emmons v. Dowe, 2 Wis. 322.

⁴ Heeron v. Beckwith, 1 Wis. 22; Moulton v. Smith, 32 Me. 406.

⁵ Appleton v. Barrett, 22 Wis. 568. Pleas were, did not take or detain. Verdict, "we find the right of property to be in plaintiff, and assess his damages as one cent." *Held*, insufficient to authorize judgment in his favor. It was not responsive to the issues. Richardson v. Adkins, 6 Blackf. 142.

⁶ Warner v. Hunt, 30 Wis. 200.

need not be in express words when the intention of the jury is clear. Thus, where the plaintiff, in his declaration, sets up several distinct causes of action, and general issue is pleaded, and the jury allow him certain specified causes, and say nothing about the others, the verdict may be sufficient to authorize a judgment for him to the extent to which it finds for him; and such verdict, and judgment thereon, will be a bar to a second action on the causes not named in express words.¹

§ 752. **The same. Illustrations.** When the suit was for two slaves, "Ben" and "Joe," the verdict was, we find for the plaintiff for "Ben," and was silent about "Joe," the court said, we do not suppose any one would regard this as a verdict upon part of the issues. The silence of the verdict as to "Joe" is equivalent to an express finding as to him for the defendant.² Verdict, that the "defendant had a special property in the goods to an amount of an execution," stating it, and that the "plaintiff had unjustly taken and detained it," and assessing damages is sufficient, though it ought to determine the general ownership.³

§ 753. **The verdict may be general if it cover all the issues.** When the verdict, by its terms, necessarily disposes of all the material issues in the case, an express finding upon all the separate issues may not be essential. When the defendant pleads property in himself, and property in A., and in a stranger, a finding of property in the defendant, upon the first plea, is sufficient, though the others are disregarded.⁴ The jury may sometimes deliver a general verdict, embracing all the issues submitted, and such verdict is clear and explicit upon them all. Thus, when the pleas are *non cepit*, *non detinet*, property in defendant, and property in third person, a general verdict,

¹ Brockway v. Kinney, 2 John. 210; Freas v. Lake, 2 Col. 480; Irwin v. Knox, 10 John. 365; Markham v. Middleton, 2 Strange, 1259; Lewis v. Lewis, Minor, (1st Ala.) 95; Ward v. Masterson, 10 Kan. 73.

² Wittick v. Traun, 27 Ala. 566. To same effect, see Stoltz v. The People, 4 Scam. (Ill.) 168; Clark v. Keith, 9 Ohio, 73; Hotchkiss v. Ashley, 44 Vt. 198; Brown v. Smith, 1 N. H. 36.

³ Single v. Barnard, 29 Wis. 463; White v. Jones, 38 Ill. 161.

⁴ Ramsey v. Waters, 1 Mo. 406; Faulkner v. Meyers, 6 Neb. 415. See Freas v. Lake, 2 Col. 480.

"we, the jury, find the issues for the defendant," is equivalent to a finding of all the issues for the defendant. It is not simply equivalent to a verdict of not guilty. The verdict of not guilty would be responsive only to the pleas of *non cepit* and *non detinet*.¹ Where the answer was, first, general denial; second, property in defendant; and third, property in a stranger, the verdict was, "we find for the plaintiff, that he is entitled to possession, and find value to be \$125." *Held*, sufficient to cover all the issues.² When the verdict was for the defendant, \$28.75, on a plea of property, it was, in effect, a verdict for the defendant generally, and a judgment for return, with costs, was correct.³ A contrary conclusion, however, on a similar finding, was reached in Iowa. It was for the defendant, for \$50, and was said to be a verdict that the plaintiff was entitled to the property upon paying the defendant that sum.⁴

§ 754. *The same. Illustrations.* When the plaintiff alleged that he was the absolute owner, and entitled to the immediate possession of the property, and the verdict was, "we, the jury, find for the plaintiff," it was held sufficient to warrant judgment for the plaintiff. The verdict was to the effect that the plaintiff was the absolute owner, and entitled to the immediate possession;⁵ but a general verdict cannot be sustained when the issues are conflicting, and when all cannot be truly found for one party or the other.⁶ When those issues are submitted, the jury should find whether the party has title to the property on the right of possession only.⁷

¹ *Freas v. Lake*, 2 Col. 480; *Underwood v. White*, 45 Ill. 438. We find for the plaintiff, and against the defendant, was sufficient. *Krause v. Cutting*, 28 Wis. 655; *S. C.*, 32 Wis. 688; *Rhodes v. Bunts*, 21 Wend. 19; *Wheat v. Catterlin*, 23 Ind. 85.

² *Clark v. Heck*, 17 Ind. (Harr.) 281.

³ *Huston v. Wilson*, 3 Watts. 287.

⁴ *Hunt v. Bennett*, 4 Greene, (Iowa,) 512.

⁵ *Rowan v. Teague*, 24 Ind. 304.

⁶ *Hewson v. Saffin*, 7 Ohio, Pt. 2, 234; *Johnson v. Howe*, 2 Gilm. 346.

⁷ *Wolf v. Meyer*, 12 Ohio St. 432; Verdict that the plaintiff is the owner, and lawfully entitled to possession of the logs described in the complaint, and that their value is \$—, and the plaintiff's damages are \$—, is a general verdict for the plaintiff, and is equivalent to a special finding that the logs were detained by the defendant. *Eldred v. The Oconto Co.*, 33 Wis.

§ 755. **Verdict should not merge different issues.** The verdict should not amalgamate different issues, unless it be clear that such a verdict will be responsive to all of them, and that it will give the court clear and unmistakable information of what the jury intended to find upon each. Thus, the jury should not amalgamate damages for the taking or detention of property with the value of the property taken. Each should be found separately;¹ otherwise, the court cannot tell from the verdict what judgment to render.² Where the declaration contains a sufficient cause of action properly stated, with other matter not actionable, and damages are awarded, it will be presumed that the damages were given on the actionable part only. Thus, the declaration was for one table, chest and other articles specified, and for one-third of four stacks of fodder. The verdict was for the plaintiff, and damages assessed at \$91. The court refused to disturb the verdict, presuming that the damages were assessed on the articles specified and not on the two-thirds part of the fodder.³

§ 756. **Separate defendants may have separate verdicts.** When there are several defendants, it is error to assume that all of them are guilty of the acts charged in the declaration; the jury should be left to say whether all were engaged in the acts complained of or not,⁴ and they may find one or more of the defendants guilty and acquit others;⁵ or may find one guilty as to a portion and not guilty as to other portions of the property.⁶

§ 757. **Verdict must be certain.** The verdict must be certain. When four hogs were replevied, and the jury found two of them to be the property of the plaintiff, without stating

137. To same effect, see *Stephens v. Scott*, 13 Ind. 515. Compare *Swain v. Roys*, 4 Wis. 150.

¹ *Nashville Ins. Co. v. Alexander*, 10 Humph. 383; *Sayers v. Holmes*, 2 Cold. (Tenn.) 259.

² *Carson v. Applegarth*, 6 Nev. 188.

³ *Ellis v. Culver*, 1 Har. (Del.) 76.

⁴ *Dart v. Horn*, 20 Ill. 213.

⁵ *Carothers v. Van Hagan*, 2 G. Greene, (Iowa,) 431; *Hotchkiss v. Ashley*, 44 Vt. 199; *Wilderman v. Sandusky*, 15 Ill. 60.

⁶ *Simpson v. Perry*, 9 Geo. 508; *Walker v. Hunter*, 5 Cranch. C. C. 462.

which two, the verdict was regarded as uncertain and insufficient.¹ Verdict describing the property as "said property," if the goods are sufficiently described in the declaration, is good.² When the jury found for the plaintiffs \$5,619.37, and in the verdict stated that this amount, less the advances and commissions, was due the plaintiff, without finding what those advances and commissions were, the verdict was uncertain, and no judgment could be rendered on it.³ When the issue was *non detinet* and title to the property in the defendant, a verdict for defendant when the jury assessed value of property and nominal damages, did not warrant a general judgment for the defendant, though it was doubtless proper for the court to put it in form.⁴

§ 758. **The same. Illustrations.** When but one issue is presented in the pleadings, a general verdict for plaintiff, assessing damages and value of the property separately, is sufficient.⁵ So a verdict that the property belonged to the plaintiff, and that he should recover one cent damages for detention was a sufficient finding that the plaintiff was entitled to possession.⁶

§ 759. **Must be consistent.** The verdict must not be inconsistent with itself; the findings upon the separate issues presented must be such as will be consistent with each other, and such as can be carried into effect in a judgment. There was a complaint against A. and B. A. pleaded property in a stranger; B. pleaded it in himself. The jury found a verdict as follows: "We, the jury, find for the defendants." The verdict, being general, was regarded as inconsistent and repugnant; the property, according to the letter of the finding, was in a stranger, and at the same time in one of the defendants; this

¹ *Machette v. Wanless*, 1 Col. 225; *Campbell v. Jones*, 38 Cal. 507; *Dowell v. Richardson*, 10 Ind. 573.

² *Anderson v. Lane*, 32 Ind. 102.

³ *Wood v. Orser*, 11 Smith, (25 N. Y.) 348. See, also, *Donaldson v. Johnson*, 2 Chand. (Wis.) 160.

⁴ *Donaldson v. Johnson*, 2 Chand. (Wis.) 160.

⁵ *Everit v. Walworth Co. Bank*, 13 Wis. 419; *Fitzer v. McCannan*, 14 Wis. 63; *Wheat v. Catterlin*, 23 Ind. 88.

⁶ *Stephens v. Scott*, 13 Ind. 515; *Gotloff v. Henry*, 14 Ill. 384.

was impossible. The court intimated, however, that if the parties were to treat it as a general finding for the defendants upon the question of wrongful taking only, it might be sufficient upon that issue, but it would not authorize judgment for a return.¹ If there be a material repugnancy in the verdict, it is not competent for the court to decide which is true and which is false; if it were the court could substitute its judgment for that of the jury; in such cases it can only set the verdict aside.²

§ 760. **Value of property; when must be found.** The rules in some of the States require the jury to find the value of the property;³ but the fact that they did not so find should be taken advantage of at the first opportunity.⁴ The verdict must find both the value and the damages for detention, or it is doubtful if any judgment can be rendered upon it;⁵ even when the defendant waives a return, the value should be found.⁶ In other States, and by the common law, the value is immaterial.

§ 761. **Value of separate articles.** In many of the States the jury are required to find the value of each separate article, so that upon a return of part of the entire lot the defendant may be discharged from the payment of the value of that part.⁷ This provision is intended for the benefit of the party who is adjudged to deliver the goods, so that he may not be compelled

¹ *Tardy v. Howard*, 12 Ind. 404; *Hewson v. Saffin*, 7 Ohio, pt. II. 234; *Contra*, *Edelen v. Thompson*, 2 Har. & G. (Md.) 31.

² *Hewson v. Saffin*, 7 Ham. (Ohio,) pt. II. 232; *Barrett v. Hall*, 1 Mas. 447.

³ *Everit v. Walworth Co. Bank*, 13 Wis. 419; *Fitzer v. McCannan*, 14 Wis. 63; *Wallace v. Hilliard*, 7 Wis. 627; *Farmers' L. & T. Co. v. Com. Bank*, 15 Wis. 424. Even though not denied. *Jenkins v. Steanka*, 19 Wis. 126; *Carson v. Applegarth*, 6 Nev. 188; *Lambert v. McFarland*, 2 Nev. 58; *Pickett v. Bridges*, 10 Humph. (Tenn.) 175; *Bates v. Buchanan*, 2 Bush. (Ky.) 117; *Young v. Parsons*, 2 Met. (Ky.) 499.

⁴ *Watts v. Green*, 30 Ind. 99.

⁵ *Wallace v. Hilliard*, 7 Wis. 627.

⁶ *Farmers' L. & T. Co. v. Com. Bank*, 15 Wis. 424.

⁷ *Whitfield v. Whitfield*, 40 Miss. 369; *Hoeser v. Kraeka*, 29 Tex. 451; *Eslava v. Dillihunt*, 46 Ala. 698; *Drane v. Hilzheim*, 13 S. & M. (Miss.) 337; *Caldwell v. Bruggerman*, 4 Minn. 270; *Pickett v. Bridges*, 10 Humph. (Tenn.) 175. *Contra*, *Ward v. Masterson*, 10 Kan. 78.

to deliver goods and at the same time pay the value; and objection to a verdict, when the value of several articles is assessed in one gross sum, must be taken at the earliest practicable moment. This rule is in force in many States, but is not universal.

§ 762. **Conditional verdict.** A verdict that is conditional upon some subsequent act of the party is not warranted.¹ So one which expresses an opinion of law without deciding questions of fact cannot be sustained.²

§ 763. **Value where the party's interest is limited.** The amount which the defendant may recover is not necessarily the full value of the property; when the defendant has only a limited interest, the value of that, and not the full value, will be awarded him. Thus, with an execution upon property less than its value, there would only be a claim to the extent of the sum for which the execution issued, and interest.³ Where property is taken from an officer by the defendant in the execution, verdict for the officer should be for the amount of the execution; but when replevied by one who is a stranger to the process, the officer may be liable over to the defendant from whom it was taken; in such case the finding for the officer should be the full value.

§ 764. **Verdict for damages; when essential.** In *McKean v. Cutler*, 48 N. H. 372, it was said that a verdict for plaintiff upon a question of title will not be set aside because the jury did not find damages; the judgment for damages is not a necessary ingredient in replevin. This case is entitled to the more weight because it considers and differs from *Kendall v. Fitts*, 2 Foster, (N. H.) 9, and because in this way the question was directly and forcibly presented, as to whether a judgment for damages is an essential one in replevin. It is

¹ Verdict that the plaintiff was entitled to the property provided a chattel mortgage was not paid in ten days. *Rose v. Tolly*, 15 Wis. 443.

² Verdict was: "We find the plaintiff had a right to replevy the mill." *Held*, to amount only to a conclusion of law, which the jury had no authority to decide; judgment could not be rendered upon it. *Keller v. Boatman*, 49 Ind. 108.

³ *Booth v. Ableman*, 20 Wis. 21; *S. C.*, 20 Wis. 603; *Single v. Barnard*, 29 Wis. 463.

probable, however, that the courts will not extend the doctrine laid down in *McKean v. Cutler*. It must be borne in mind that damage is one of the principal questions in replevin; that it is always claimed in the declaration.¹ And when with this, is considered the fact that all the issues presented must be passed upon, it will seem the better course to insist upon a verdict and final judgment for damages (nominal in amount, if no more), in all cases.

§ 765. **The same.** When damages other than nominal are awarded, they must, in all cases, be assessed by a jury,² unless by consent of parties a jury is waived.

§ 766. **The judgment.** The judgment in replevin, when the court has jurisdiction of the persons and subject matter, is conclusive upon all parties.³ It may determine the property, the special property, or the right of possession; and when so determined the parties cannot set up or claim different rights or interests as against the judgment.⁴ The parties may have separate interests; if so the judgment should not be joint.⁵ When the court has no jurisdiction, it cannot render a judgment against the defendant, even for costs.⁶

§ 767. **Should embrace all parties and all issues.** The judgment should be for or against all parties; final judgment against part of the defendants will not dispose of the case as to others, and will be erroneous. It is equally important that all the parties should be disposed of as that all the issues should be.⁷ The judgment, therefore, should determine all the issues, *i. e.*, all the rights of all the parties to all the property.⁸ It may be good as to some defendants, and bad as

¹ *Buckley v. Buckley*, 12 Nev. 423; *Faget v. Brayton*, 2 H. & J. (Md.) 350.

² *Pearsons v. Eaton*, 18 Mich. 80.

³ *Maids v. Watson*, 13 Mo. 544; *Pomeroy v. Cocker*, 4 Chand. (Wis.) 174; *Lutes v. Alpaugh*, 23 N. J. L. 165; *Penrose v. Green*, 1 Mo. 774.

⁴ *Carlton v. Davis*, 8 Allen, 94; *Witter v. Fisher*, 27 Iowa, 10; *Lowe v. Lowry*, 4 Ohio, 78; *Perry v. Lewis*, 49 Miss. 443.

⁵ *Sweetzer v. Mead*, 5 Mich. 107.

⁶ *Collamer v. Page*, 35 Vt. 387.

⁷ *Barbour v. White*, 37 Ill. 164.

⁸ *Dow v. Rattle*, 12 Ill. 373; *Rose v. Tolly*, 15 Wis. 444; *Perry v. Lewis*, 49 Miss. 443.

to others;¹ but when a writ of replevin against two defendants is served upon one, a judgment against both is wholly void.²

§ 768. **The same.** Where the court without a jury passes upon the issues the judgment should determine all the issues submitted, the same as required with a jury. If the judgment is for the plaintiff the court should find the value of the property, where that is necessary, and that the plaintiff is the owner or entitled to its possession; it should assess damages and order a delivery, if that has not been had upon the writ. Each of these steps are essential to a valid judgment.³

§ 769. **Must be certain.** Where a justice entered judgment as follows: "A trial was had and a judgment rendered against the defendant for one cow," it was held not sufficient. It did not find the value of the property, or that the plaintiff was entitled to possession; nor did it assess the damages. It could not be read in evidence in another case for the same cow.⁴

§ 770. **Judgment upon default.** When the plaintiff failed to appear the defendant, at common law, had judgment for a return and damages.⁵

§ 771. **When property has been delivered plaintiff cannot have value.** When the property has been replevied and delivered to the plaintiff, of course he cannot have judgment for the value. He must take judgment for the property in his possession and such damages and costs as he can obtain.⁶

§ 772. **Judgment for value or delivery.** Where the plaintiff has not already obtained the possession of the property by his writ or order for delivery, and has judgment in his favor, the form of the judgment is for the delivery of the goods, or for

¹ *Mercer v. James*, 6 Neb. 406.

² *Ouly v. Dickinson*, 5 Cold. (Tenn.) 486.

³ *Beemis v. Wylie*, 19 Wis. 319; *Bates v. Wilbur*, 10 Wis. 416; *Heeron v. Beckwith*, 1 Wis. 17; *Beckwith v. Philleo*, 15 Wis. 224.

⁴ *Beemis v. Wylie*, 19 Wis. 319.

⁵ Stat. 7 H. VIII. Ch. 4; Wilk. on Rep. 72.

⁶ *Rockwell v. Saunders*, 19 Barb. 473; *Seaman v. Luce*, 23 Barb. 240; *Merrill v. Butler*, 48 Mich. 294; *Blackwell v. Acton*, 38 Ind. 426; *McNamara v. Eisenleff*, 14 Abb. Pr. (N. S.) 25; *Rowark v. Lee*, 14 Ark. 426; *Garrett v. Wood*, 3 Kan. 231.

the value in case a delivery cannot be had.¹ The judgment in such cases is usually required to be in the alternative. In Minnesota there can be no judgment for value if the property can be delivered. A judgment for value not in the alternative is not necessarily erroneous if the court perceive that the delivery is impossible.² It does not follow from an omission of the court to ascertain the value and render the judgment therefor that the property had no value, or that such value cannot be ascertained in suit upon the bond.³ Therefore, where judgment for value or in the alternative is not imperative under the statute, the judgment may be for a return of the goods; in such case the value may be ascertained and recovered in suit upon the bond, if the return is not made.⁴

§ 773. **Judgment in the alternative for the goods or for their value.** When the judgment is for the defendant, and he is entitled to a return, the judgment should be in the alternative, *i. e.*, for the delivery of the property, or in case that cannot be had then the value of the property as found by the jury;⁵ upon such judgment he is entitled to all the processes of the court which are issuable upon other judgments.

§ 774. **Exceptions to this rule.** There are cases which hold that the defendant may waive the return and take judgment for the value alone if he so elect.⁶ This rule, however, varies in different States; the statute controls, and upon this subject

¹ *Ward v. Masterson*, 10 Kan. 77; *Marix v. Franke*, 9 Kan. 132; *Clary v. Roland*, 24 Cal. 149, and cases last cited. See, also, *Fitzhugh v. Wiman*, 9 N. Y. 559; *Glann v. Younglove*, 27 Barb. 480; *Gallarati v. Orser*, 4 Bosw. (N. Y.) 94; *Smith v. Coolbaugh*, 19 Wis. 107.

² *Boley v. Griswold*, 20 Wall. 486. Cases last cited.

³ *Kafer v. Harlow*, 5 Allen, 348; *Hawley v. Warner*, 12 Iowa, 42; *Mason v. Richards*, 12 Iowa, 73; *Nickerson v. Chatterton*, 7 Cal. 568; *Clary v. Roland*, 24 Cal. 147.

⁴ *Hall v. Smith*, 10 Iowa, 45.

⁵ *Mason v. Richards*, 12 Iowa, 73; *Eslava v. Dillihunt*, 46 Ala. 702; *Smith v. Coolbaugh*, 19 Wis. 107; *Jansen v. Effey*, 10 Iowa, 227; *Marix v. Franke*, 9 Kan. 132; *Chissom v. Lamcool*, 9 Ind. 531; *Bales v. Scott*, 26 Ind. 202; *Easton v. Worthington*, 5 S. & R. 133; *Dwight v. Enos*, 9 N. Y. (5 Seld.) 470; *Hall v. Jenness*, 6 Kan. 365; *Copeland v. Majors*, 9 Kan. 104; *Nickerson v. Chatterton*, 7 Cal. 568; *Pratt v. Donovan*, 10 Wis. 379.

⁶ See *Smith v. Coolbaugh*, 19 Wis. 107; *People v. Tripp*, 15 Mich. 518; *Williams v. Vail*, 9 Mich. 162.

it is the only guide. In Illinois the judgment is for the return and not in the alternative, except where the property was held as security for the payment of money; in such case the judgment may be in the alternative for the payment of the amount for which it was rightfully held, with damages within a given time to be fixed by the court, or make return of the property.¹ In California a judgment which left the defendant at liberty to pay the amount or deliver the property, as he might elect, was held erroneous; it must be for the delivery of the property, if delivery can be had, or for the value in case it cannot.² In Wisconsin the defendant may waive a return and take judgment for the value of the property.³ The same rule prevails in Michigan⁴ and in Arkansas, where an acceptance of a verdict for the value will be sufficient without a formal waive of a return on record.⁵ In New York the defendant cannot elect to take judgment for the value, but it must be in the alternative.⁶ In Mississippi the value of each separate article must be found; judgment should be for the delivery of each, or the payment of its value; upon the delivery of any one or more of the articles the defendant stands discharged from the payment of its value.⁷ This is also the rule in Texas.⁸ The code of Alabama requires the jury to assess the value of each separate article where it is practicable. When the articles were a large number of house goods of small value, and neither the plaintiff nor defendant objected to the verdict when returned, an assessment of the value in gross was held sufficient.⁹ In Tennessee, with reference to such articles as

¹ Rev. Stat. Ill. Ch. 119, § 22.

² *Cummings v. Stewart*, 42 Cal. 232.

³ *Pratt v. Donovan*, 10 Wis. 378; *Morrison v. Austin*, 14 Wis. 602; *Farmers' L. & T. Co. v. Com. Bank of Racine*, 15 Wis. 425.

⁴ *Adams v. Champion*, 31 Mich. 235; *Wheeler v. Wilkins*, 19 Mich. 78; *People v. Tripp*, 15 Mich. 518.

⁵ *Hill v. Fellows*, 25 Ark. 13.

⁶ *Seaman v. Luce*, 23 Barb. 240; *Fitzhugh v. Wiman*, 5 Seld. (N. Y.) 559.

⁷ *Whitfield v. Whitfield*, 40 Miss. 369. See, also, *Caldwell v. Bruggerman*, 4 Minn. 270; *Hoeser v. Kraeka*, 29 Texas, 451; *Pickett v. Bridges*, 10 Humph. (Tenn.) 175.

⁸ *Hoeser v. Kraeka*, 29 Texas, 451.

⁹ *Eslava v. Dillihunt*, 46 Ala. 702.

are in their nature distinct, the jury must find the value of each separately.¹ So in Mississippi, the jury must assess the value of each separate article; but what in common understanding is considered as parts of one whole may be so in law. In replevin for a barouche and harness and two horses, the barouche and harness may be regarded as parts of one whole, and but one value placed upon them; but the horses should be valued separately.² Where the defendant gives bond under the statute and retains the property the judgment for the plaintiff should be in the alternative for the property or its value.³

§ 775. Judgment for each party for different parts of the goods. It sometimes happens that the plaintiff recovers a verdict for a portion only of the property, while the defendant has a verdict for the remainder. In such cases, each is entitled to judgment for the portion so found for him, together with damages and costs in so far as he is successful. When the action was for merchandise, and the jury found the defendant "guilty" as to all the property mentioned, except two pieces of satin, and that the plaintiff recover all the goods except those, and that he also recover one cent damages, and that the defendant recover the satin and four dollars and twenty cents damages, it was held that the judgment must follow the verdict, and that the costs must be apportioned equitably. In such case the court, under its general powers, could set off the damages and costs and award execution for the balance, when no reason for a contrary course appeared to exist.⁴

§ 776. Separate judgments as to separate defendants. Where there are several defendants, a verdict as to one need not embrace the others. One may be guilty of the taking or of detention and the others not. The rules which apply in

¹ *Pickett v. Bridges*, 10 Humph. (Tenn.) 171; *Rowland v. Mann*, 6 Ired. (N. C.) 38; *Sayers v. Holmes*, 2 Cold. (Tenn.) 259.

² *Drane v. Hiltzheim*, 13 S. & M. (Miss.) 337.

³ *Anderson v. Tyson*, 6 S. & M. (Miss.) 244.

⁴ *Poor v. Woodburn*, 25 Vt. 239. See, also, *Brown v. Smith*, 1 N. H. 36; *Powell v. Hinsdale*, 5 Mass. 343; *Clark v. Keith*, 9 Ohio, 73; *O'Keefe v. Kellogg*, 15 Ill. 353; *McLarren v. Thompson*, 40 Me. 285; *Wright v. Mathews*, 2 Blackf. (Ind.) 187.

cases of trespass govern the judgment in replevin. The constant practice is to render judgment against one who may be found guilty and at the same time discharge those not guilty.¹ So, when the action is against joint defendants, the court may adjudge a return of the goods to one of several, while as to the others no return is allowed.² Where there is more than one defendant, when judgment is against all, it must be a joint judgment for joint damages; each of the defendants is jointly liable for all the damages which the plaintiff has sustained without regard to the fact that one may have been more or less guilty than the others.³ But the plaintiff may, before verdict, enter *nolle prosequi* as to one and take judgment as to the others, and when the jury erroneously assess several damages, the plaintiff may enter a *nolle* as to all but one and take judgment against him.⁴

§ 777. Order for delivery part of the judgment. The order of delivery is part of the judgment.⁵ It must be made at the same time, or at least while the court has its record before it; it cannot be made at a subsequent term, even upon notice to the other party. The court has no power to correct its records at a subsequent term.⁶

§ 778. Defendant entitled to reasonable time to comply with the judgment for return. When the judgment is for a return or payment of the value, the defendant is entitled to a reasonable time within which to make the return, and so excuse himself from the payment of the value. Thus, where

¹ Carothers v. Van Hagan, 2 G. Greene, (Iowa,) 481; Church v. DeWolf, 2 Root, (Conn.) 282; Wakeman v. Lindsay, 19 L. J. Q. B. 166; Addison v. Overend, 6 Term R. 357 and 767; Ouly v. Dickinson, 5 Cold. (Tenn.) 486.

² Woodburn v. Chamberlin, 17 Barb. 452.

³ Clark v. Bales, 15 Ark. 452; Layman v. Hendrix, 1 Ala. 212; Simpson v. Perry, 9 Geo. 508; Fuller v. Chamberlain, 11 Met. 503.

⁴ Crawford v. Morris, 5 Gratt. 90; Wallace v. Brown, 5 Fost. 216; Holley v. Mix, 3 Wend. 350; Cahoon v. Bank of Utica, 3 Seld. (N. Y.) 490; Pearce v. Twichell, 41 Miss. 346.

⁵ Weizen v. McKinney, 2 Wis. 288; Nickerson v. Chatterton, 7 Cal. 572; Kates v. Thomas, 14 Minn. 461; Dwight v. Enos, 5 Seld. (N. Y.) 470; Wilkins v. Treynor, 14 Iowa, 393; Clark v. Warner, 32 Iowa, 219; Funk v. Israel, 5 Iowa, 454; Fitzhugh v. Wiman, 9 N. Y. 559.

⁶ Lill v. Stookey, 72 Ill. 495.

the judgment was for a return of the mare and colt in dispute, or in lieu thereof one hundred and sixty dollars, a few days thereafter the plaintiff tendered the mare and colt to the defendant, who refused to receive them and demanded the money value as assessed by the jury, a tender within thirty days was held to be within a reasonable time.¹

§ 779. **Effect of payment of judgment for value.** Where the judgment is against the defendant for value, and that value is paid, the effect of the judgment and payment is to transfer the title to the party against whom the judgment is rendered.² So in trover judgment for plaintiff changes the ownership, so that as against the defendant this plaintiff cannot again claim title.³ But in replevin the right to possession may be the only issue to be tried, and in such case the judgment is no evidence of title. When the title is in issue and determined, the judgment will, of course, be conclusive upon the parties until reversed in a legal manner,⁴ and this rule applies as well where the property is not delivered upon the writ as where it is.⁵

§ 780. **The same.** When plaintiff sued for rails, and the defendant had used part of them in building a fence before the service of the writ, judgment for damages in replevin was a bar to subsequent suit in trover for the value.⁶ The record of an ineffectual suit in replevin for money is not a bar to another action for the same money.⁷

§ 781. **Judgment of non-suit does not affect title.** Judgment of non-suit or discontinuance does not bar the plaintiff from another action for the same cause.⁸ This was the com-

¹ McClellan v. Marshall, 19 Iowa, 562.

² Marix v. Franke, 9 Kan. 132.

³ Adams v. Broughton, Andrews, 18. See Hoag v. Breman, 3 Mich. 162.

⁴ Seldner v. Smith, 40 Md. 603; Wallace v. Clark, 7 Blackf. 299; Warner v. Matthews, 18 Ill. 83. See Judgment for Return, *ante*, Ch. XVI.

⁵ Parmalee v. Loomis, 24 Mich. 242.

⁶ Bower v. Tallman, 5 W. & S. (Pa.) 556. See, also, Osterhout v. Roberts, 8 Cow. (N. Y.) 43; Livingston v. Bishop, 1 Johns. 290; Sharp v. Gray, 5 B. Mon. (Ky.) 4; Jones v. McNeil, 2 Bailey, (S. C.) 466.

⁷ Sager v. Blain, 5 Hand, (44 N. Y.) 448.

⁸ Hackett v. Bonnell, 16 Wis. 471; Daggett v. Robins, 2 Blackf. 415; Westcott v. Bock, 2 Col. 335.

mon law. The statute in England, Stat. Westm. 2d, 13 E. 1 C. 2, which restrains the plaintiff from a second replevin, but permits him to proceed by a writ of second deliverance, is applicable only to actions founded upon a distress, and is local to that kingdom.¹

§ 782. **Judgment of dismissal.** When the suit is dismissed for informality the plaintiff may maintain another action upon the original unlawful taking. Such judgment for return constitutes no bar to this action because the case was not heard upon its merits. Nor is it a valid objection that the defendant has not in fact taken out any writ of return or actually taken the property into his possession. The judgment for a return was ordered upon the defendant's motion to dismiss the writ; the plaintiff yielded to it and returned the property to the place from which he had taken it under his defective proceeding; this left the plaintiff's case where it was when he instituted his first action.²

§ 783. **Illustrations of the effect of judgment.** When the plaintiff in replevin who had obtained delivery of the goods upon his writ sold them and afterwards died and the suit was abated, the defendant in the suit brought replevin from the purchaser and was permitted to set up his prior title to sustain his action against the purchaser; the record of the first suit, which was abated, constituting no bar.³ So judgment by default does not always settle the rights to the property; there should be a finding by the court.⁴ But parties sued in trespass cannot set up the fact that they sold the property to one from whom the owner has recovered it in replevin. The recovery in replevin from a purchaser from a trespasser is no defense for the trespasser.⁵

§ 784. **Judgment for value of limited interest.** When the interest of the defendant is less than the value of the property a judgment in his favor should not be for full amount, but

¹ Daggett v. Robins, 2 Blackf. 418.

² Walbridge v. Shaw, 7 Cush. 560; Wilbur v. Gilmore, 21 Pick. 250; Morton v. Sweetser, 12 Allen (Mass.) 134.

³ Lockwood v. Perry, 9 Met. 446.

⁴ Studdert v. Hassell, 6 Humph. (Tenn.) 137.

⁵ McGee v. Overly, 7 Eng. (Ark.) 164.

only for the value of his interest, unless he is in some way liable to the general owner. When the suit is for mortgaged property, defendant succeeding is entitled to a return; but in such cases he only takes the lien of his mortgage; if he ask for judgment for the full amount he must take the value of his interest.¹

§ 785. **Judgment for value on count in trover.** In Illinois, where the officer's return shows that the property or any part of it was not delivered, the plaintiff may add a count in trover, and upon proper proof take judgment for the value of the property not delivered.² The rule in Tennessee and Florida is similar to that of Illinois in this respect, and was so in Colorado until changed by statute.

§ 786. **When property is lost judgment for return immaterial.** Where it appears upon trial that the property is hopelessly lost or destroyed so that a judgment for a return would be of no avail, a failure to render a judgment for its return would be at most a technical error, for which judgment for the value would not be reversed.³

§ 787. **Judgment for value in such cases.** The death or destruction of the property does not necessarily do away with the necessity of judgment for the value. By the ancient law the property was presumed to belong to the plaintiff, and the only interest which the defendant claimed in it was the right to hold it as security or a pledge for the rent claimed to be due. Property so seized or impounded was, even while in pound, at the owner's risk if it died.⁴ If replevied by the owner the landlord lost his lien and was required to look to the security upon the bond; if the animal died pending the replevin suit the rights of the landlord were not affected. But under the present practice the controversy is more frequently concerning the title or right of possession than of distraint. The common law, therefore, furnishes no rules to determine what the judgment should be in such cases. In

¹ *Fowler v. Hoffman*, 31 Mich. 221; *Russell v. Butterfield*, 21 Wend. 300.

² *Kehoe v. Rounds*, 69 Ill. 352; *Dart v. Horn*, 20 Ill. 213.

³ *Brown v. Johnson*, 45 Cal 77; *Boley v. Griswold*, 20 Wall. 486.

⁴ See *ante*, § 8; *Gilbert on Rep.*; 3 Bla. Com. 145.

New York it was held that when the property was an animal that died before a return, plea showing that fact, and that it died without the fault of the defendant, was good.¹ But where the property is wrongfully taken out of the owner's possession upon a writ of replevin the taker cannot, upon judgment against him, excuse his liability for the payment of the value by showing its death or destruction. Property so taken is not at the risk of the rightful owner while in possession of the wrongful taker. This question, however, more properly arises in another place.²

¹ *Carpenter v. Stevens*, 12 Wend. 589.

² See Damages, § 600, *et seq.*

CHAPTER XXV.

MISCELLANEOUS.

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§ 788. **Contesting creditors cannot invoke the aid of the insolvent laws against each other.** In replevin by an attaching creditor, from one who claims under purchase from the debtor, the attaching creditor cannot invoke the aid of the insolvent laws of the State to set aside a sale or transfer to the other.¹ The insolvent laws are only for the benefit of those who claim under them. The assignee may have recourse to such law in some cases to defeat a sale to a creditor, but the rights of contesting creditors, who do not claim under the assignee, are not affected by the insolvent laws.

§ 789. **Nor set up a forfeiture under usury laws.** In a suit where the plaintiff claimed from an assignee in insolvency, and the defendant claimed under a mortgage made by the insolvent, the mortgage debt was not paid, but the plaintiff offered to show that it was for usury; that if statutory penalty of threefold the usurious interest was deducted from it, the

¹ Gardner v. Lane, 9 Allen, (Mass.) 497.

debt would be canceled. He therefore claimed the right to regard the mortgage as paid. *Held*, that the forfeiture for usury must be judicially determined upon an issue on that question before it could be applied to reduce the debt so as to affect the lender's title to his security, and judgment was for the defendant.¹ The right to deduct the forfeiture in a suit to enforce the contract is by no means payment of the debt.²

§ 790. **Right to begin and conclude.** While the defendant is an actor, and so far a plaintiff, it does not follow that he has the right to begin and conclude. In determining which party has the right, the court should consider, not so much the form of the issue as the substance and effect of it. The question is, on whom is the burden of proving the issue? The obligation rests upon him to make it out by a preponderance of proof; he therefore has the right to begin and conclude.³ Where the defendant pleads property in himself, with a traverse of the plaintiff's rights, there is still such a burden of proof upon the plaintiff as to entitle him to begin and conclude.⁴ But when the defendant pleads property without traverse, he assumes the burden of proving the property to be his. If no proof be offered, the judgment upon such plea would be for the plaintiff. In such case the defendant may begin. Such plea is regarded as admitting the plaintiff's claim, and asserting a superior right in the defendant.

§ 791. **Trial upon the facts existing when the suit began.** According to the general rule, the suit is tried on the state of fact as they existed at the commencement of the suit.⁵ This rule must prevail, unless there be some peculiar reasons existing to the contrary.⁶ Where the defendant justified as an officer, under an attachment, evidence to show that it was dissolved

¹ *McNeal v. Leonard*, 1 Allen, 399. See same case, 3 Allen, 268.

² *Ib.*

³ *Bills v. Vose*, 7 Foster, (N. H.) 215; *Belknap v. Wendell*, 1 Foster, (21 N. H.) 181.

⁴ *Marsh v. Pier*, 4 Rawle, (Pa.) 273.

⁵ *Currier v. Ford*, 26 Ill. 492; *Belden v. Laing*, 8 Mich. 500; *Cassell v. Western, etc., Co.*, 12 Iowa, 47; *Hickey v. Hinsdale*, 12 Mich. 99; *Loomis v. Youle*, 1 Minn. 175; *Clark v. West*, 23 Mich. 242.

⁶ *Cary v. Hewitt*, 26 Mich. 228.

after the property was replevied was immaterial, as the rights of the parties depend upon the facts existing at the time the suit was begun.¹ So in suit on bond, when the issue in replevin was title to the property, and that was found for the defendant, he was not allowed, in the suit upon the bond, to set up a subsequently acquired title as a defense.² But this rule will not prevent the consideration of damages to the time of the judgment, as interest is computed on a note; neither will the court refuse to consider the rights of the defendant to a return at the time return is asked.

§ 792. **Date of writ not conclusive as to commencement of suit.** The date of the writ is not necessarily conclusive as to the time the suit was begun. If the action had not accrued on the day of the date of the writ, but did accrue before the date of the service, and there is no evidence of the date when the writ was issued or used, in any way, the presumption would be that the action was brought after it had accrued.³

§ 793. **All matters in dispute should be settled in the replevin suit.** The legal interests of the parties should, as far as possible, be determined in the replevin suit; that should be final. By this is meant all the legal rights of the parties at issue, or which may properly be determined in the suit should be finally settled. But where the plaintiff dismisses the suit, and the court awards a return, the security may plead limited interest or want of title, in reply to the suit upon the bond.⁴ Where the plaintiff claims property, and the defendant claims a lien, as poundmaster, the jury should find whether the plaintiff was the owner, and whether the property was subject to this lien.⁵

§ 794. **Defense by bailee.** A bailee of goods, when sued, may show that his bailor did not own them. He is not bound to retain possession at all hazards, and is under no obligation to resist an apparently good claim made by another person, at

¹ *McCraw v. Welch*, 2 Col. 287.

² *Carr v. Ellis*, 37 Ind. 467.

³ *Federhen v. Smith*, 3 Allen, 119. See, also, *Swift v. Crocker*, 21 Pick. 241; *Seaver v. Lincoln*, 21 Pick. 267.

⁴ *Hayden v. Anderson*, 17 Iowa, 158.

⁵ *Warner v. Hunt*, 30 Wis. 202.

the expense of a lawsuit,¹ though fair dealing in this respect would require him to notify the bailor, if practicable, so that he might resist, if he saw fit. The rule in ejectment requires the tenant to notify the landlord of any suit to dispossess him. The same reasons would apply where the bailee was sued for a chattel by a stranger. The bailor might determine for himself whether to yield to the claimant, or contest his right; or he might notify his bailee, which would be the preferable course.

§ 795. **Effect of a submission to arbitration.** An unconditional submission of the suit in replevin to the award of arbitration, is a discontinuance of it. The parties have agreed to resort to another and different forum. In such case the liability of the security is at an end. The bond was conditioned to secure the due prosecution of the suit; the prosecution was dispensed with by agreement of the defendant for whose benefit the bond was made.² But if the submission contains the agreement that a judgment of court shall be entered upon the award, such an entry will be equivalent to a judgment after trial.³

§ 796. **Plea in abatement, another suit pending.** Plea in abatement, setting up a prior replevin, which did not allege any affidavit for the issue of first writ, or that the writ commanded the sheriff to take this property, was insufficient.⁴

§ 797. **The same to the affidavit.** The statute is that no plea in abatement other than to the jurisdiction, or when the matter relied upon shall appear of record, shall be admitted unless sworn to. But a plea in abatement to the affidavit which is not a part of the record must be sworn to.⁵

§ 798. **Limitations.** Plea of *non cepit infra sex annos* is

¹ Learned v. Bryant, 13 Mass. 224.

² Reeve v. Mitchell, 15 Ill. 297; Perigo v. Grimes, 2 Col. 656; Perkins v. Rudolph, 36 Ill. 307; Smith v. Barse, 2 Hill, 387; Archer v. Hale, 4 Bing. (13 E. C. L.) 464; Larkin v. Robbins, 2 Wend. 505; Towns v. Wilcox, 12 Wend. 503; Wells v. Lane, 15 Wend. 99; Moore v. Bowmaker, 1 E. C. L. Rep. 663; Bowmaker v. Moore, 1 Exch. Rep. 355.

³ Thorpe v. Starr, 17 Ill. 199; Camp v. Root, 18 Johns. 22; Green v. Patchin, 13 Wend. 293; *Ex parte* Wright, 6 Cow. 399; Yates v. Russell, 17 Johns. 461; Merritt v. Thompson, 27 N. Y. 232; Hills v. Passage, 21 Wis. 298.

⁴ Belden v. Laing, 8 Mich. 501.

⁵ Town v. Wilson, 8 Ark. 465.

bad; it should be *actio non accrevit infra sex annos*.¹ The plea of *non cepit infra sex annos* is no answer to the charge of wrongful detention; the defendant may not have taken the beasts; as, for instance, where a colt was foaled while the mother was in the pound, the plea might be true, but would be no answer to the plaintiff's action.² Where the goods in dispute are wrongfully taken, the statute of limitations begins to run from the time of taking; but where the taking was rightful, the statute does not begin to run until demand and refusal, or until the defendant shall have actually converted the goods, or done some act from which the law will imply a conversion. Thus, when goods were taken by an officer on an execution which was afterwards set aside for irregularity, which rendered it void, the statute was considered as beginning to run from the time of the taking.³ Where the suit was for notes deposited with the defendant, which were afterwards demanded of him and delivery refused, it was held that the statute began to run from the demand and refusal; and a subsequent demand and subsequent refusal, after the defendant had parted with the property, would not take the case out of the statute;⁴ but if the defendant had had the property in his hands at the time of the second demand, the statute would undoubtedly have commenced to run from such second delivery.

§ 799. **Amendments.** In replevin, as at present administered, liberal amendments are allowed for the furtherance of justice;⁵ or upon a variance between the pleadings and the proof, the former may be amended or disregarded upon the trial, if not calculated to prejudice or surprise the opposite party.⁶ Where the avowry was for rent due at the end of the year, and the proof showed rent due half yearly, amendment was permitted without costs.⁷ When the plaintiff's writ by

¹ *Arundel v. Trevin*, 1 Keble, 279.

² *Gilbert on Replevin*, 131.

³ *Read v. Markle*, 3 Johns. 524.

⁴ *Kelsey v. Griswold*, 6 Barb. 436.

⁵ *Applewhite v. Allen*, 8 Humph. 698. Clerical mistakes in the form of the writ. *Cutler v. Rathbone*, 1 Hill, 205.

⁶ *East Boston Co. v. Persons*, 2 Hill, 126

⁷ *Ib.*

mistake stated that the defendant "has taken" and detains, and the intention was to sue for the detention only, amendment, by striking out the words "has taken," was permitted.¹ So when the statute required sufficient securities, and the writ contained instructions to the sheriff to take "surety or *sureties*," the striking out the words "surety or" was allowed on motion.² Where the writ was addressed to the sheriff, but was served by the coroner, upon a motion to quash and a cross-motion to amend by addressing it to the coroner, the cross-motion was allowed.³

§ 800. **Amendment of affidavit.** The affidavit may be amended in furtherance of justice; this, however, can usually be done only by a new affidavit, supplying what was omitted in the first.⁴ Where affidavit was signed by plaintiff, but no jurat, and he filed affidavit that it was sworn to; *held*, that the affidavit might have been verified *nunc pro tunc*.⁵ In an Indiana case, it was said in a suit upon the bond that the court could revise and correct the proceeding in the replevin suit; that the plaintiff in the suit upon the bond might file supplemental pleadings to conform his suit to the amendment.⁶ This carries the rule much further than the current of authority in other States warrants. The plaintiff may be allowed to file an amended bond,⁷ or affidavit,⁸ in cases where the court judges proper; but such amendments are in the discretion of the court, and when it appears that the question raised upon the bond or affidavit will be the validity of a tax levy, the leave will be refused.⁹ Reasonable amendments to the pleadings are permitted whenever the ends of justice will be

¹ Anon., 4 Hill, 603.

² Poyen v. McNeill, 10 Met. 291.

³ Simcoke v. Frederick, 1 Carter, (Ind.) 54.

⁴ Applewhite v. Allen, 8 Humph. 698.

⁵ Bergesch v. Keevil, 19 Mo. 128.

⁶ Wheat v. Catterlin, 23 Ind. 85.

⁷ Whaling v. Shales, 20 Wend. 673; Smith v. Howard, 23 Ark. 203.

⁸ Frink v. Flanagan, 1 Gilm. 38; Parks v. Barkham, 1 Mich. 95; Phenix v. Clark, 2 Mich. 327; Jackson v. Virgil, 3 Johns. 540; Shelton v. Berry, 19 Tex. 154; Crist v. Parks, 19 Tex. 234; Eddy v. Beal, 34 Ind. 161.

⁹ McClaughry v. Cratzenberg, 39 Ill. 123.

promoted; in case either party is taken by surprise, he is entitled to a continuance, or reasonable time to prepare.¹

§ 801. **Death of party to the suit.** It remains to be considered what effect the death of a party will have upon the suit. Replevin has ever been regarded as in the nature of tort, and such actions die with the person, in the absence of statutory provisions to continue them.² So replevin has in many cases been held to abate with the death of the defendant,³ and judgment for return, which could only be made upon some investigation into the merits, was refused.⁴ In *Miller v. Langton*, Harper, (S. C.) 131, the court says, in substance: There is nothing in the nature of this action, nor in the doctrine on the subject of replevin under the various statutes or the common law, which will make this action an exception to the general rule in such cases, that where the plaintiff dies the suit abates. The merits of the case have nothing to do with the question of abatement. The defendant loses no right; he is only in the situation of any other person prosecuting a right. The writ of *retorno* cannot issue, because that would be unjust; because the return could only be made upon a determination of the merits, and here no determination on the merits can be had. In a case in trover which arose in Pennsylvania the court said in substance: If by possibility a case should arise in which there was originally no other remedy than trover, we should be sorry to say that by the death of the defendant there should be a failure of justice. But there is no question that trover dies with the defendant; and if the plaintiff might have chosen another remedy, and chose to adopt this perishable one,⁵ he

¹ *Hellings v. Wright*, 2 Har. (14 Pa. St.) 374.

² *Kingsbury v. Lane*, 21 Mo. 115.

³ *Webber v. Underhill*, 19 Wend. 447; *Burkle v. Luce*, 6 Hill. 558; *Burkle v. Luce*, 1 N. Y. 163; *Hopkins v. Adams*, 5 Abb. Pr. R. 351; *Same v. Same*, 6 Duer, 685; *Mellen v. Baldwin*, 4 Mass. 480; *Foster v. Chamberlain*, 41 Ala. 158; *Rector v. Chevalier*, 1 Mo. 345; *Lockwood v. Perry*, 9 Met. 440.

⁴ *Miller v. Langdon*, Harper, (S. C.) 131; *Merritt v. Lumbert*, 8 Gr. (Me.) 128. Death of plaintiff does not abate the suit. *Reist v. Heilbrenner*, 11 S. & R. (Pa.) 132.

⁵ *Hench v. Metzger*, 6 S. & R. 273. See *Ld. Mansfield in Hambly v. Trott*, Cowp. 374.

has no ground of complaint if his action perish. But these cases do not stand alone. In an able case in Pennsylvania it was said: "Replevin does not abate by the death of a defendant while the suit is pending; where one man has property of another in his possession, his fortune ought to answer it."¹ The reason for the rule which abated such suits was, that an action for tort was purely personal. When the tortfeasor retains the property, all reasons seem to point to the justice of making his representations answer for its delivery. In Maryland it is held that the suit does not abate by the death of the plaintiff; his executor or administrator may be made party and prosecute.² So in New York; it survives the death of the plaintiff, and is continued in the name of his representatives; the sureties continue to be liable; but it does not survive the death of the defendant.³

¹ *Keite v. Boyd*, 16 S. & R. 301.

² *Fister v. Beall*, 1 Har. & J. (Md.) 31.

³ *Lahley v. Brady*, 1 Daly, 443. See *Heinmuller v. Gray*, 44 How. Pr. 260; *Emerson v. Bleakley*, 2 Abb. Dec. 22.

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